TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 255.

THE CITY OF COVINGTON, KENTUCKY, AND JOHN N. MIDDENDORF, ASSESSOR OF THE CITY OF COVINGTON, APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED FEBRUARY 20, 1901.

(18,056.)

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1 UNITED STATES OF AMERICA, }
District of Kentucky, } ss:

At a stated term of the circuit court of the United States of America within and for the district of Kentucky, in the sixth judicial circuit of the United States of America, begun and held at Federal Court hall, in the city of Covington, Kentucky, in said district, on the first Monday of December, being also the 3rd day of that month, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-fifth year.

Present: Hon. Walter Evans, sitting as circuit judge.

THE FIRST NATIONAL BANK OF COVINGTON, KY., a Corporation, }
vs. }
THE CITY OF COVINGTON, a Municipal Corporation, and JOHN N. Middendorf, the Assessor of the City of Covington. }

Be it remembered that heretofore, to wit, on the 23rd day of July, A. D. 1900, came the complainant, by its attorney, and filed in the clerk's office of said court its bill of complaint against the defendants herein. Said bill of complaint was and is in words and figures following, to wit:

2 United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, a Corporation, }
vs. } Bill of Complaint.
THE CITY OF COVINGTON, a Municipal Corporation, and John N. Middendorf, the Assessor of the City of Covington. }

To the honorable the judge of the circuit court of the United States in and for the district of Kentucky:

The First National Bank of Covington, Kentucky, a corporation organized, existing, and doing business in the city of Covington, Kentucky, under and by virtue of the act of the Congress of the United States known as the national bank act and amendments thereto, brings this its bill against the City of Covington, a municipal corporation organized and existing under the laws of the State of Kentucky, and John N. Middendorf, the duly elected, qualified, and acting city assessor of the city of Covington and a citizen of said State of Kentucky and an inhabitant of the district of said State of Kentucky.

And thereupon your orator complains and says that it was organized, authorized, permitted, and chartered to do business as such national bank in the city of Covington, Kentucky, on the 17th day of November, 1884, for a term of twenty (20) years thereafter, up to and including the 17th day of November, 1904, the authority so to

do having been issued to it upon said 17th day of November, 1884,
by the then Comptroller of the Currency of the United States;
3 and the said City of Covington is a city of the second class in
and of the State of Kentucky, and was a municipal corporation in Kentucky at all the times herein stated; and the said John N. Middendorf is now and has for more than one year last past been the city assessor of said city of Covington.

And your orator, further complaining, says that the Commonwealth of Kentucky, by an act of its General Assembly, incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments thereto was authorized to engage in the business of banking for a term ending in the year 1906, and by other acts of its General Assembly it incorporated the Northern Bank of Kentucky and the Farmers' Bank of Kentucky and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906, and it says that it was provided in the various acts incorporating said respective banks that said banks should, through their cashiers, on the first day of July in each year during the continuance of their charters, pay into the treasury of the State fifty cents on each share of $100 of stock, which should be in full of all tax or bonus, and your orator says that from the year 1835 up to and including the year 1886, in pursuance of the contracts thus made by the State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State of Kentucky in July of each and every year a tax of fifty cents on
each one of its shares of one hundred dollars, although at no
4 time during said period was so great a rate of tax paid to
the said Commonwealth upon any other species or kind of property.

Complainant says that beginning with the year 1882 an effort was made to subject the property of the said Bank of Kentucky and the Farmers' bank and other banks to the payment of local or municipal taxes in addition to the said tax paid to the State of Kentucky, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes, in addition to the fifty cents on each share of one hundred dollars of its capital stock, and that was paid to the said Commonwealth.

And complainant says that on and before the 17th day of May, 1886, suits were pending in the courts of the Commonwealth of Kentucky under the styles of The Bank of Kentucky against The City of Frankfort, and the Farmers' Bank of Kentucky against The City of Frankfort, and The City National Bank of Paducah, Kentucky, against The City of Paducah, etc., wherein *it* was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

And complainant says that the said Commonwealth of Kentucky, by an act of its General Assembly approved the 17th of May, 1886,

entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and by article second thereof, under the subject of "Stocks in banks and other institutions," in view of the fact that under the contract it had entered into with said bank, whereby, upon a payment by the banks in said State of Kentucky to its annually of fifty cents on each share of one hundred dollars of their respective stock, they were exempt from the payment of any other tax or bonus during and for the period ending in 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky, and provided as follows, to wit:

SECTION ONE. "That shares of stock in State and national banks, and other institutions of loan and discounts, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions, and corporations shall in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

And further provided that the auditor of public accounts might, at his option, investigate the books of such banks or institutions for the purpose of ascertaining the surplus, &c., and made said banks and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by section two: "The cashier of a bank, and the treasurer of any other institution or corporation whose stock is taxed, shall on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and required an affidavit from him stating the amount of the capital stock, &c., of the bank and how the surplus was invested.

SECTION FOUR. "That each of said banks institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax and agree to pay the same as herein provided, and to waive and to release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement

or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of said bank."

SECTION FIVE. "That said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly:—Provided, they pay the tax provided in section 1 from the passage of this act."

SECTION SEVEN. "If any bank, State or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution or corporation, and its surplus, undivided accumulations, and undivided profits, shall
7 be assessed as directed by section 2 of this act, and the same taxes, State county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals. Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

And your orator, further complaining, says that the terms and conditions of said act of May 17th, 1886, were accepted by and the contract therein provided for entered into and made with the State of Kentucky by said Bank of Kentucky, Farmers' bank, and Northern Bank of Kentucky, and by a very large majority of all the banks, both State and national, and other institutions of loan and discount in the State of Kentucky.

Complainant says that within the time provided by section 5 of said act and upon the 22nd June, 1887, at a called meeting of its stockholders, a majority in interest and of a quorum of its stockholders gave their consent to the levying of the tax thus provided and agreed to pay same as in said act provided, and to waive and release all rights of the plaintiff under the acts of Congress or under the charter of the State banks to a different mode or smalled rate of taxation, and authorized the proper officers of the complainant to so agree, consent, and waive and to make and enter into said contract, upon the part of this complainant and its shareholders, to and with the State of Kentucky, and to deliver to the governor of said
8 State a writing, under seal of complainant and executed by its proper corporate authorities, evidencing such agreement, consent, and contract to and with the State of Kentcky.

And complainant says that upon the 22nd June, 1887, it did deliver to the then governor of the Commonwealth of Kentucky such written agreement and consent, an authenticated copy of which is filed herewith as part hereof, marked "Exhibit A," wherein and whereby the State of Kentucky entered into an irrevocable contract with your complainant, which the said State cannot annul or repeal without the consent of your complainant, and is binding on said

State and all its departments, including the defendant City of Covington.

And your orator, further complaining, says that it, the complainant, has paid said tax, as provided in section one of said act, from the passage of said act of the 17th of May, 1886.

And complainant says that upon the first day of July of each and every year since the passage of said act of May 17th, 1886, and the making of said contract and agreement with the State of Kentucky it has made to the auditor of public accounts of said State the reports as by section 2 of said act required and paid into the treasury of the State of Kentucky a tax of seventy-five cents on each of its shares of stock of one hundred dollars and on the surplus and on the excess of surplus and on its real estate, as by said law provided and by the said contract agreed, which tax by it so paid has been accepted and received and retained by the State of Kentucky. It says that it has since regularly and each year paid to defendant City of Covington all the tax assessed or demanded by said city on its real
9 estate and banking building, and there is now no tax claimed by said defendant to be due or owing thereon.

Your orator, further complaining, says that the rate of taxes assessed by the State of Kentucky upon all other real and personal estate during all of said years, beginning with the year 1886, and since that time, has not exceeded in any one year fifty-two and one-half cents on each one hundred dollars of assessed valuation, and during several of said years has been much less, being as low as forty-two and one-half cents on each one hundred dollars' valuation during a part of said period.

Complainant avers that the defendant City of Covington and all of its officers, including the defendant John N. Middendorf, are exclusively estopped by former litigation and adjudication between your complainant and said City of Covington to contend in this suit that your complainant has not an irrevocable contract with the State of Kentucky limiting its taxes to those fixed in said act of 17th May, 1886, known as the Hewitt law, and that the said city has not right to assess for taxation for municipal purposes or collect any taxes on any of its shares of stock or any of its property other than its banking building and the land upon which it is situated.

Complainant says that the State of Kentucky, by an act of 11th of November, 1892, of its General Assembly, which became a law without the signature of the then governor, undertook to provide a different mode of assessing the value of the capital stock and property of complainant and other banks in the State of Kentucky, and to invalidate and repeal the contract entered into by and
10 between it and the State of Kentucky, as hereinbefore stated, under the act of May 17th, 1886, commonly known as the Hewitt law, to which invalidation and repeal this complainant never consented or agreed, said act of 11th of November, 1892, constituting the auditor, treasurer, and secretary of state a board of valuation and assessment for fixing the value of the franchise of all banks and providing that all banks should annually pay a tax on such valuation so fixed to the State of Kentucky and a local tax thereon to the county,

incorporated city, town, or taxing district where the bank was situated, and said board of valuation and assessment did fix the value of the franchise of this complainant, upon which it would pay tax to the defendant The City of Covington for the year 1893, at $719,441.30, and certified the same to the county court clerk of Kenton county, Kentucky, in which county your complainant was and is situated, which clerk certified the same to the city treasurer of defendant City of Covington, all of which was in accordance with said act of 11th of November, 1892, and the defendant's rate of taxation for said year 1893, being two dollars and seven cents on the one hundred dollars valuation, made a tax of $14,892.43, which said city claimed to be entitled to receive for city purposes from this complainant and for which it threatened to distrain and to take other steps by said act authorized, said defendant, City of Covington, claiming that said contract had been invalidated and repealed, and your complainant having theretofore paid to said defendant, City of Covington, the taxes upon its real estate and banking building that were used in carrying on its business, the said $14,892.30 or any part thereof not being claimed upon the real estate owned by complainant. Complainant, insisting and
11 relying upon its contract made and entered into with the State of Kentucky, as heretofore stated, which exempted it and its shares of stock from all taxation by the City of Covington, and that the said defendant had no right to assess or exact any taxes whatsoever upon its capital stock or the shares thereof, and that it and its shares of stock were exempted from taxation by the said defendant, and the said defendant, City of Covington, contending that said contract had been by the State of Kentucky invalidated and repealed, and that this complainant and its shares of stock were not by reason of such contract exempt from taxation by the City of Covington, it, the complainant, on the 17th of November, 1893, filed its action in equity in the Kenton circuit court against the defendant herein, The City of Covington, the said Kenton circuit court being a court of full and complete jurisdiction in the premises, setting up the making and existence of its said contract with the State of Kentucky and the facts in relation thereto and all the facts hereinbefore stated, and that the State of Kentucky had no right to annul or repeal said contract, and that said act of 11th of November, 1892, in so far as it attempted so to do, was in violation of the Constitution both of the United States and of the State of Kentucky in impairing the obligation of a contract, being in violation of section 10, article 1, of the Constitution of the United States and of section 19 of the constitution of the State of Kentucky, and relying on its contract, as hereinbefore stated and entered into, and that by reason of said contract it and its shares of stock were exempt from any taxation by the defendant City of Covington during the corporate existence of complainant, and by the prayer thereof
12 prayed that the City of Covington be enjoined and restrained from collecting or attempting to collect said alleged tax of fourteen thousand eight hundred ninety-two and $\frac{43}{100}$ ($14,892.43) dollars or any part thereof, and that said alleged claim be adjudged

invalid by reason of said contract, and for all proper relief and for its costs, etc. Complainant says that summons was issued upon its said petition in equity so filed, and was executed upon the defendant The City of Covington on the 17th of November, 1893, and upon the 27th of November, 1893, said defendant, City of Covington, appeared to said petition in said action and filed its demurrer to said petition; and it says that thereafter the judge of the Kenton circuit court, being personally interested in the result of the litigation, declined to preside in said cause of this complainant against The City of Covington, and by agreement said cause was transferred to the Campbell circuit court at Newport, Kentucky, it being a court of full and complete jurisdiction in the premises, and the said cause thereafter proceeded in the said court to a final hearing and determination. It says that said cause having been presented to the said Campbell circuit court, it having been fully advised in the premises, on the 27th of January, 1894, adjudged and decided that the said demurrer of complainant to the said petition in equity should be overruled, and, the defendant failing and refusing to answer in the case, the said Campbell circuit court adjudged and determined that the contract entered into by and between the said plaintiff, the complainant herein, and the State of Kentucky on the 17th May, 1886, known as the Hewitt law, was valid and binding and was irrevocable during the
13 existence of this complainant by paying said tax to the State of Kentucky of seventy-five cents on each of its shares of capital stock equal to one hundred dollars, and on the excess of its surplus, as in said Hewitt law provided, which should be in full of all taxes, State, county, and municipal, and that the City of Covington could not demand or collect any taxes whatsoever upon any of its shares of stock or any of its property except the real estate owned and used by it for conducting its business, and perpetually enjoined the said City of Covington from attempting to collect said alleged tax for said year 1893 by said city claimed; and complainant says that the said City of Covington excepted to said judgment of the Campbell circuit court and prayed an appeal to the court of appeals of Kentucky therefrom, which appeal was by said Campbell circuit court granted. Complainant says that the defendant City of Covington prosecuted said appeal from said judgment of the Campbell circuit court to the court of appeals of Kentucky, and the said matter was presented and submitted to the court of appeals of Kentucky, and the said court thereafter, upon the first day of June, 1895, adjudged and determined that the written acceptance by complainant of the provisions of the said revenue law of 1886, known as the Hewitt law, constituted an irrevocable contract between it and the State of Kentucky during its corporate existence, and that it and its shares of stock were exempted from any taxes by the defendant City of Covington during the corporate existence of complainant, and that the provisions of said act of 11th of November, 1892, attempting to authorize such taxation, *was* in violation of the provisions of the Constitution
14 of the United States, that no State could pass any law impairing the obligations of a contract, and also violative of the

State constitution, and affirmed the judgment of the Campbell circuit court, from which the said City of Covington had appealed. The opinion and judgment of said court of appeals of Kentucky in said cause of City of Covington, appellant, against The First National Bank of Covington, Ky., appellee, is reported at pages 590 to 646, both inclusive, of volume 97 of the reports of the cases decided by said court of appeals of Kentucky.

Complainant says that thereupon, upon the 10th day of October, 1895, the said court of appeals issued its mandate on said judgment; which mandate is in words as follows, to wit:

"THE COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON, Appellant,
vs.
FIRST NATIONAL BANK OF COVINGTON, Appellee.

Appeal from a judgment of the Campbell circuit court.

JUNE 1, 1895.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

A. A. ADDAMS, *C. C. A.*,
By ROB'T L. GREENE, *D. C.*"

Complainant says that said mandate was, upon the 2nd day of December, 1895, filed in the said cause in the Campbell circuit court.

15 Complainant files herewith as part of this its bill a certified copy of the entire record in said cause in the Campbell circuit court, all pleadings, orders, and judgments, and marks it Exhibit "B."

Complainant further says that the said judgment of the court of appeals of Kentucky in said appeal by the said City of Covington, defendant herein, from the said judgment of the Campbell circuit court in favor of this complainant in said cause so adjudging that this complainant had such irrevocable contract with the State of Kentucky, and that the said defendant, City of Covington, by reason of said contract, had no right to assess for taxation its capital stock or its shares of stock or any property of this complainant other than its real estate and banking building, as hereinbefore stated, or to collect or to attempt to collect any taxes from it or upon its said property or capital stock or shares of stock or any part thereof, and that it- shares of stock are not assessable by the said defendant, City of Covington, for taxation during the corporate existence of complainant, has never been reversed or modified in any respect, nor was there ever any appeal therefrom, and said judgment and holding by said Campbell circuit court and by the court of appeals of

Kentucky was and is final and conclusive between this complainant and the City of Covington, and the question as to the existence of said irrevocable contract by and between it and the State of Kentucky, precluding the defendant, City of Covington, from in any way asserting such claim for taxes against it or against its shares of stock or any of its property other than its real estate and banking
16 building, as hereinbefore stated, during its said corporate existence, was and is *res judicata* and binding and conclusive upon said defendant, City of Covington, and all of its officers and agents and this complainant during the term of its corporate existence, as hereinbefore stated, and said City of Covington is conclusively estopped from claiming or asserting to the contrary or assessing for or attempting to collect any tax on its shares of stock or other property other than its real estate.

And complainant further shows unto your honor that the defendant City of Covington, notwithstanding the premises, is asserting the right and power to assess for taxation for municipal purposes all of the shares of the capital stock of this complainant for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900, and said City of Covington and its city assessor, John N. Middendorf, are claiming the right and power so to do by reason of the provisions of the act of the General Assembly of the Commonwealth of Kentucky, entitled "An act relating to the taxation of shares of stock of national banks," approved March 21, 1900, being senate bill No. 188, and chapter 23 of the Session Acts of 1900 of the General Assembly of the Commonwealth of Kentucky, and found on page 65 of the official publication of the acts of said session of said General Assembly, said act and its preamble being as follows:

"Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three of the Acts Eighteen hundred and ninety-one, Eighteen hundred and ninety-two, Eighteen hundred and ninety-three is void and of no
17 effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SEC. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

SEC 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be
18 excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

SECTION 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

And your orator, further complaining, says that the said
19 defendant, John N. Middendorf, city assessor of the city of Covington, heretofore on the — day of May, 1900, called upon this complainant and demanded of it that it report to and list with him for taxation for municipal purposes by the City of Covington all of the shares of stock of this complainant for the years 1893 to 1900, both inclusive, and that in response to said demand its board of directors, on the 6th day of June, 1900, adopted a resolution directing its president and cashier, for the reasons in said resolution set out, being the same as in this bill set forth, not to report to or list with the said city assessor of the city of Covington for taxation any of the shares of its stock, and it furnished a copy of said resolution to the said John N. Middendorf, city assessor of the city of Covington. A copy of said resolution so adopted by its board of directors and presented to said city assessor of the city of Covington is filed herewith as part hereof, marked "Exhibit C."

Your orator further says that heretofore, on the — day of June, 1900, the said John N. Middendorf, city assessor of the city of Covington, caused to be executed upon Frank P. Helm, the president of

complainant, a notice in writing, calling upon said Frank P. Helm, as president of this complainant, to, on or before the 30th day of June, 1900, report to him, said John N. Middendorf, city assessor as aforesaid, at his office and list with him for taxation for municipal purposes by the City of Covington all of the shares of stock of this complainant for the said years 1893 to 1900, both inclusive; and the said John N. Middendorf, city assessor, as aforesaid, has announced to said Frank P. Helm, president, and threatened that unless the said Frank P. Helm, as president of complainant, will forthwith report to and list with him, as such city
20 assessor, for taxation for municipal purposes by the defendant City of Covington all of the shares of stock of this complainant, that he, the city assessor, as aforesaid, will state the facts to the police judge of the defendant City of Covington and cause said police judge to issue a warrant against said Frank P. Helm, the president of this complainant, or its cashier, and move said judge of the police court of the city of Covington to fine said Frank P. Helm, president, as aforesaid, or said cashier, for failing to report to and list with him, as city assessor, as aforesaid, all of the shares of stock of this complainant for taxation for municipal purposes by the City of Covington, and by process of contempt from said court compel said Frank P. Helm, president, as aforesaid, or its cashier, to list said shares of stock for taxation for municipal purposes by the City of Covington for each of the years aforesaid, said John N. Middendorf claiming the right and power so to do under and by reason of the provisions of the general law of Kentucky governing cities of the second class in said State, of which class the defendant City of Covington is, and especially and particularly section 3179 of the Kentucky statutes.

Your orator further shows unto your honor that during each of said years 1893, 1894, 1895, 1896, and up to first day of July, 1897, the capital stock of complainant was $500,000, and since then and is now $300,000, divided into shares of one hundred dollars each, which shares during all of said time and now are of a fair cash value of at least one hundred dollars each, and there was levied by the city council of the defendant City of Covington upon each one hundred dollars' valuation of taxable property within the
21 corporate limits of the said city of Covington a tax of two dollars and seven cents for the year 1893 and two dollars for each of the years 1894 to 1898, both inclusive, and a tax of one dollar and seventy-five cents for the year 1899 and one dollar and ninety cents for the year 1900; and there is more than two thousand dollars involved in this litigation, and the tax upon its shares of stock asserted by said defendant, City of Covington, would amount to more than two thousand dollars for each and every of said years.

And your orator says that, unless enjoined and restrained by this honorable court, the said City of Covington and said John N. Middendorf, city assessor of the city of Covington, will undertake to have the president or cashier of this complainant arrested by warrant from the police court of the city of Covington, and the said president or cashier will be required to employ counsel and make

defense, or this complainant on their behalf, and in case of proceeding by contempt complainant will be deprived of the services of its said president or cashier, and in any case their time will be taken in defending such proceeding, and it will be deprived of their attention, essential to its business, and the said City of Covington and its city assessor, John N. Middendorf, will undertake to assess for taxation for municipal purposes by the city of Covington all of the shares of stock of this complainant for each of said years and collect the tax so assessed and levied; and complainant says that the attempted assessment of its shares of stock and collection of taxes thereon by the City of Covington for municipal purposes and said proposed arrest of the president or cashier of this complainant is without authority of law, and said act of the
22 said General Assembly of the Commonwealth of Kentucky of 21st of March, 1900, is in violation of and an impairment of the obligations of the contract entered into by and between it, this complainant, and the State of Kentucky upon the 22nd of June, 1887, and, as to complainant, unconstitutional and void; and complainant says that said action by the City of Covington and by its city assessor and the attempted assessment or collection of any tax whatsoever from it or upon its shares of stock, as hereinbefore stated, and said act of the General Assembly of the Commonwealth of Kentuckey, approved 21st March, 1900, hereinbefore referred to, in so far as it attempts to in any way authorize or empower said City of Covington to impose or collect such tax, was and is null and void and contrary to the provisions of the Constitution of the United States, and contrary to section 10, article I, of said Constitution of the United States, and is an attempted taking of the property of complainant and of its shareholders for public use and without due process of law, and is a taking of their property without just compensation, and in violation of and contrary to the provisions of article V of the amendments to the Constitution of the United States.

And your orator, further complaining, says that such assessment by defendant City of Covington and its assessor, John N. Middendorf, or other officer, will be illegal, in violation of complainant's contract, as has been heretofore in said cause between it and said City of Covington adjudged, and will be unlawful and violative of complainant's contract; will cast a cloud over complainant's shares of stock and of its legal rights, and cause much litigation, and with no tribunal provided by law to which it can appeal for redress save the
23 courts, and damage it and its shareholders in a way that cannot be repaired or estimated at the common law, but its only remedy is by a bill in equity, and unless restrained by this honorable court the defendants City of Covington and John N. Middendorf, city assessor, will attempt to assess, levy, and collect taxes under said act of 21st March, 1900, and will subject complainant to the embarrassment of much litigation and cast a cloud on its shares of stock, its franchise and property, and the effort will be made to arrest its president or cashier and proceed by contempt in said police court, and to collect a penalty imposed by the charter of the defendant on all delinquent tax bills.

And your orator, further complaining, says that all this is contrary to equity and tends to the manifest wrong and injury of complainant in the premises. In consideration thereof and forasmuch as complainant is remediless in the premises at and by the rules of law, and can have adequate relief only in a court of equity, where matters of this kind are properly cognizable and relievable—

To the end, therefor-, that your orator may have the proceedings on the part of the City of Covington and its city assessor to assess for taxation and collect any tax for municipal purposes by said City of Covington all or any of the shares of its stock or its property, other than its real estate and banking building, for the years 1893 to 1900, both inclusive, and the proceedings to arrest the president or cashier of this complainant, and thereby to compel said officer to list the said shares of stock for said purposes for said years, may be enjoined, and that it may be adjudged
24 that there is an irrevocable contract by and between this complainant and the State of Kentucky upon the continued compliance by it with the provisions of the said act of the General Assembly of the Commonwealth of Kentucky of 17th May, 1886, whereby no taxes for municipal purposes can be exacted from it or imposed upon the shares of stock or any of its property whatsoever of any kind or character, save and except its real estate and banking building, where it does business, during or pending the corporate existence of complainant, to wit, until and including the 17th November, 1904, and that said act of said General Assembly, approved March 21st, 1900, in so far as it attempts to impair the validity of said contract, be declared null and void and contrary to the provisions of the Constitution of the United States, your orator respectfully prays that a temporary injunction may be granted as follows: restraining said defendant City of Covington, and its said city assessor, John N. Middendorf, from assessing or attempting to assess for taxation for municipal purposes by the City of Covington for the years 1893 to 1900, both inclusive, or any of them, the said shares of stock or any of it or its capital stock or its property of any kind or character, and from arresting or attempting to arrest said Frank P. Helm, its president, or its cashier for failure and refusal to report to and list with the said city assessor said shares of stock for taxation for said purposes for said years, and that upon final hearing said injunction may be made perpetual, and that the contract aforesaid by and between it and the State of Kentucky be adjudged to be irrevocable during the corporate existence of complainant, and that said act of the General Assembly of the
25 Commonwealth of Kentucky, approved March 21st, 1900, be declared null and void in so far as it attempts to impair the validity of the contract aforesaid, and that such irrevocable contract exists between it and the State of Kentucky is *res judicata*, and that defendant City of Covington is estopped to claim or assert that plaintiff has not such irrevocable contract.

And may it please your honor to grant unto your orator writ of subpœna, issuing out of and under the seal of this honorable court, directed to said defendants respectively, therein and thereby com-

manding them and each of them, upon a day certain and under a penalty to be therein inserted, to personally be and appear before this honorable court and then and there to answer the premises (but not under oath), and to stand to and abide by such orders and decree therein as to the court shall seem proper.

And may it please your honor to grant unto your orator such other and further relief in the premises as shall be agreeable to equity and good conscience.

J. W. BRYAN,
Solicitor for Complainant.

UNITED STATES OF AMERICA, }
State of Kentucky, County of Kenton. }

Frank O. Helm, being first duly sworn, on oath says that he is the president of The First National Bank of Covington, Kentucky, the complainant in the above-entitled cause; that he has read the foregoing bill of complaint and knows the contents thereof to be true except as to such matters as are therein stated from information and belief, and that as to those things he believes them to be true.

FRANK P. HELM.

26 Sworn to before me and subscribed in my presence this 19th day of July, A. D. 1900.

R. K. TARVIN,
Notary Public, Kenton Co., Ky.

My commission expires Jan'y 8, 1902.

Exhibit "A" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

EXHIBIT "A."

A. Shinkle, president. I. D. Fry, cashier.

First National Bank of Covington, Ky.

Capital, $500,000; United States depository; surplus, $160,000.

COVINGTON, KY., *December* 24, 1887.

To his excellency, S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking-house, on Wednesday, June 22, 1887 (notice of time and object of said meeting having been sent to each stockholder), there were represented 3,603 of the total 5,000 shares of the capital stock of the said bank, and by a unanimous vote of the shares then represented, agreed and consented to accept the provisions of the act of the legis-

lature of Kentucky, chapter No. 1233, article No. 2, passed at the session of 1886.

Approved May 17, 1886.

A. SHINKLE, *President.*
I. D. FRY, *Cashier.*

A copy.
Attest: GEO. G. COULTER, *Auditor.*

27 Exhibit "B" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

EXHIBIT "B."

STATE OF KENTUCKY:

Campbell Circuit Court.

Pleas before the Honorable C. J. Helm, judge of the Campbell circuit court, at the court-house, in Newport, Ky., on the 2nd day of December, 1895.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
CITY OF COVINGTON.

Be it remembered that heretofore, to wit, on the 19th day of December, 1893, the plaintiff, First National Bank of Covington, Ky., by its attorneys, filed its transcript in the clerk's office of the Campbell circuit court against the defendant, City of Covington, in words and figures as follows, to wit:

Pleas before the honorable the Kenton circuit court, at the court-house, in the city of Covington, on the 27th day of November, 1893—Hon Geo. G. Perkins, judge.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON. } In Equity.

On November 14, 1893, the said plaintiff filed the following petition and exhibits in said court:

28 Kenton Circuit Court.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON

The plaintiff, The First National Bank of Covington, Kentucky, says it is and was on and prior to the 17th of May, 1886, and hath ever since been a national bank, organized and existing under and by virtue of the act of Congress of the United States known as the national bank act and its amendments, and hath ever since its organization been and now is located and doing business in the city of

Covington, Kenton county, Kentucky; that the defendant The City of Covington is a municipal corporation *under the laws of the State* of Kentucky.

Plaintiff says that the Commonwealth of Kentucky by act of the General Assembly incorporated in 1834 the Bank of Kentucky, which by this act of incorporation and amendments thereto was authorized to engage in the business of banking for a term ending in the year 1906, and by other acts of its General Assembly it incorporated the Northern Bank of Kentucky and the Farmers' Bank of Kentucky and other banking institutions, and by said acts of incorporation and amendments thereto authorized and empowered the said banks to engage in and do a general banking business in the State of Kentucky until the said year 1906, and it says that it was provided in the various acts incorporating said respective banks that said banks should, through their respective cashiers, on the first day of July in each year during the continuance of their charters, pay into the treasury of the State fifty cents on each share of $100 in stock,
29 which should be in full of all tax or bonus.

Plaintiff says that from the year 1835 up to and including the year 1886 that, in pursuance of the contract thus made by the said State of Kentucky to and with said banks, all banks doing business in the State of Kentucky paid into the treasury of the State, in July of each and every year, a tax of fifty cents on each one of its shares of one hundred dollars, although at no time during said period was so great a rate of tax paid to the said Commonwealth upon any other species or kind of property.

Plaintiff says that, beginning with the year 1882, an effort was made to subject the property of the said bank of Kentucky and the Farmers' bank and other banks to the payment of local or municipal taxes in addition to the said tax paid to the said State, and subsequently an effort was made to subject national banks located within the said State to the payment also of local or municipal taxes in addition to the fifty cents on each share of one hundred dollars of its stock *and* that was paid to the said Commonwealth.

And it says that on and before the 17th of May, 1886, suits were pending in the courts of this Commonwealth, under the styles of The Bank of Kentucky against The City of Frankfort and The Farmers' Bank of Kentucky against The City of Frankfort and The National Bank of Paducah, Kentucky, against The City of Paducah, &c., wherein *it* was asserted by the respective municipalities the right to subject the property of the said banks to the payment of municipal taxes, and such right being controverted by the said respective banks.

30 It says that said Commonwealth of Kentucky, by an act of its General Assembly approved the 17th of May, 1886, entitled "An act to amend the revenue laws of the Commonwealth of Kentucky," and by article second thereof, under the subject of "Stocks in banks and other institutions," in view of the fact that under the contract it had entered into with said banks, whereby, upon a payment by the banks in the State of Kentucky to it annually of fifty cents on each share of one hundred dollars of their

respective stock, they were exempt from the payment of any other *tax or* bonus during and for the period ending in 1906, and in view of the said controversies then pending for judicial determination, proposed to the banks and other institutions of loan or discount within the State of Kentucky and provided as follows, to wit:

SECTION 1. "That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

And further provided that the auditor of public accounts might, at his option, investigate the books of such banks or institu-
31 tions for the purpose of ascertaining the surplus, &c., and made said banks and institutions subject to indictment and fine for refusal to allow such investigation to be made.

And by section 2: "The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations is invested, and pay into the treasury the amount of tax due."

And further imposed a penalty upon the cashier for failure to pay such tax, and required an affidavit from him stating the amount of capital stock, &c., of the bank and how the surplus was invested.

SECTION 4. "That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement or consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence
32 of said bank."

SECTION 5. "That said banks may take the proceedings authorized by section 4 of this act at any time until the meeting of the next General Assembly: Provided, they pay the tax provided in section 1 from the passage of this act."

SECTION 7. "If any bank, State or national, shall refuse or fail to

pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of stock of such bank, institution, or corporation, and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, State, county, and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: Provided, that nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or buildings owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Plaintiff avers that the terms and conditions of said act of 17th of May, 1886, were accepted by and the contract therein provided for entered into and made with the State of Kentucky by the said Bank of Kentucky, Farmers' bank, and Northern Bank of Kentucky, and by a very large majority of all the banks, both State and national, and other institutions of loan and discount in the State of Kentucky.

33 Plaintiff says that within the time provided by section 5 of said act and upon the 22 of June, 1887, at a called meeting of its stockholders, a majority in interest and of a quorum of its stockholders gave their consent to the levying of the tax thus provided and agreed to pay the same as in said law provided, and to waive and release all rights of the plaintiff under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, and authorized the proper officers of the plaintiff to so agree, consent, and waive and to make and enter into the said contract upon the part of this plaintiff to and with the State of Kentucky, and to deliver to the governor of said State a writing, under the seal of the plaintiff and executed by its proper corporate authorities, evidencing such agreement, consent, and contract to and with the State of Kentucky.

And it says that upon the 22nd day of June, 1887, it did deliver to the then governor of this Commonwealth such written agreement and consent, an authenticated copy of which is herewith filed as part hereof, marked "Exhibit A."

And it says it paid the said tax, as provided in section one of said act, from the passage of said act of the 17th of May, 1886.

Plaintiff says that upon the first day of July of each and every year since the passage of said act of 17th of May, 1886, and the making of said contract and agreement with the State of Kentucky, it has made to the auditor of police accounts the report as by section 2 of said act required, and paid into the said treasury a tax of seventy-

34 five cents on each one of its shares of one hundred dollars and on the surplus and on the excess of surplus, as by said law provided and by said contract agreed, which tax by it so paid has been accepted, received, and retained by the State of Kentucky, except the tax by it paid upon the first of July, 1893, a por-

tion of which was to it attempted to be returned, as hereinafter stated.

Plaintiff says that the rate of tax assessed by the State of Kentucky upon all other real and personal estate during the years 1886, 1887, 1888, and 1889 and 1890 was only forty-seven cents upon each one hundred dollars of its assessed valuation, and during the year 1891 and 1892 the annual rate of tax upon all other real and personal estate was only forty-two cents upon the one hundred dollars of its assessed valuation.

Plaintiff says that upon the first of July, 1893, it made its report to the said auditor of public accounts, as by said law and its contract provided, and paid into the treasury of the State the amount of tax by it owing thereon, to wit, $4,500.00, but it says that the said treasurer, claiming that the said act of the 17th of May, 1886, had been repealed, and that the contract made by this plaintiff with the State of Kentucky thereunder, although this plaintiff's corporate existence had not ceased, had been by the said State of Kentucky abrogated, and retaining $3,057.62 of the sum so paid in by this plaintiff, returned to it the balance, with the statement that it should pay a tax at the rate of forty-two and a half cents upon the one hundred dollars of the assessed value of its tangible property to the sheriff of the county of Kenton, where its said tangible property was situated, in addition to the sum so retained by him.

35 Plaintiff says that it at once notified said treasury of Kentucky that it held said balance so retained to it subject to the order of the said treasury of Kentucky, and it says that it now holds said balance so subject to the order of said treasury, and that it hath in no way consented or agreed to any repeal or change of the said act of May 17, 1886, or of its contract made with the State of Kentucky thereunder and in pursuance thereof.

Plaintiff says that the State of Kentucky, by an act of its General Assembly which becomes a law upon the 11th of November, 1892, without the signature of the governor, undertook to provide for a mode of assessing the value of what is termed "franchises of banks and other corporate institutions," and for that purpose constituted the auditor of public accounts, the secretary of state, and the State treasurer a board of valuation and assessment, and provided that the tangible property of such banks and other corporate institutions should be assessed for the purpose of State taxation by the assessor of the county where such property was situated, and undertook to require of each bank and other institutions in said act named to report to the auditor of public accounts a full statement of all its property of every kind and the value thereof, and that, said board of valuation or assessment deducting from the total value of the property so reported the assessed value of the tangible property of such bank or other institutions, that the balance should be the value of the franchise upon which such bank or other institution should pay a tax of forty-two and a half cents upon each one hundred

36 dollars into the State treasury, and should pay a tax at the same rate upon the tangible property to the sheriff of the county where assessed.

Plaintiff says it refused to make any report to the auditor of public accounts and made none under the said act of the 11th of November, 1892, but complied with, in every respect, its contract with the State of Kentucky, as aforesaid.

Plaintiff says that the said board of valuation and assessment undertook to, and did, assess and fix the valuation of the franchise of the plaintiff at $719,441.30, and it says that said board, claiming to be acting in pursuance of the directions, provisions, and requirements of said act of the 11th of November, 1892, have certified to the defendant The City of Covington, as the valuation of plaintiff's franchise upon which said defendant is entitled to collect from this plaintiff a tax for the year 1893, said sum of $719,441.30, and plaintiff says that said defendant, The City of Covington, has undertaken to assess its alleged franchise at the rate of $2.07 on the one hundred dollars for the year 1893, making the sum of $14,892.43 which the said defendant is asserting is due and owing to it by plaintiff as a tax upon its said franchise and no part of which is claimed as a tax upon the real estate owned by this plaintiff.

Plaintiff says that it has each and every year, including the year 1893, since the making of said contract with the State of Kentucky and the passage of said act of May 17th, 1886, paid to the city of Covington all taxes due and owing to it on the real estate and building owned and used by this plaintiff for *constructing* its business.

37 Plaintiff says that said defendant, on the 30th of October, 1893, demanded of it payment of said alleged *of* $14,892.43, and threatens to and will, unless restrained and enjoined by this court from so doing, destrain the property of this plaintiff for said alleged tax.

Plaintiff says that the defendant The City of Covington is not authorized by its charter to assess any of this plaintiff's property, other than its real estate or building, for taxation, and it has no authority under its charter to collect or demand any tax upon any of its property of any kind or character, except upon said real estate or building.

Plaintiff says that its franchise is not subject to taxation by defendant. It says that the defendant has no right or authority under its charter to assess or tax any of its property other than its real estate and building, and upon which it has, as before stated, paid its taxes to defendant in full.

Plaintiff says that the said act of the General Assembly of the Commonwealth of Kentucky of 11th of November, 1892, and all other laws of the State of Kentucky which attempts to subject this plaintiff or its property to a different mode of taxation than that prescribed in said act of 17th of May, 1886, and in said contract made and entered into by and between the said State of Kentucky and the plaintiff under and in accordance with said act of 17th of May, 1886, which contract has been faithfully kept and complied with by this plaintiff, or which in any way subjects this plaintiff or any of its property other than its real estate and building to taxa-

tion by the defendant, or authorizes or empowers the defend-
38 ant to subject this plaintiff or any of its property other than its said real estate and building to the payment of any tax to the said defendant, The City of Covington, are an attempt upon the part of the said State of Kentucky to violate and impair the obligation of the contract entered into by and between said State and this plaintiff, as aforesaid, and are in violation of section ten of article one of the Constitution of the United States, prohibiting any State from passing any law impairing the obligation of contracts, and are in violation of section twenty, article thirteen, of the constitution of Kentucky in force when said act of 17th May, 1886, was passed and said contract made, and of section nineteen of the present constitution of the State of Kentucky, which was in force when said act of 11th of November, 1892, was passed, and are therefore void.

Plaintiff prays that The City of Covington, the defendant, its officers and agents, be forever enjoined and restrained from destraining or attempting to distrain any of this plaintiff's property for said alleged tax claim of $14,892.43, or from attempting to collect same or any part thereof from this plaintiff, and that said claim be adjudged invalid, and that it may have a judgment for its costs and for all proper relief.

J. W. BRYAN,
WM. GOEBEL,
Attorneys for Plaintiff.

STATE OF KENTUCKY, }
Kenton County. }

39 This affiant, Frank P. Helm, says he is president of the plaintiff, The First National Bank of Covington, Kentucky, and the statements of the foregoing petition are true, as he verily believes.

FRANK P. HELM.

Subscribed and sworn to before me by Frank P. Helm this 14th day of November, 1893.

R. K. TARVIN,
Notary Public, Kenton County, Ky.

Said exhibit is as follows:

COVINGTON, KY., *Dec.* 24, 1887.

Hon. Excellency S. B. Buckner, governor of the State of Kentucky.

SIR: We hereby certify that at a called meeting of the stockholders of the First National Bank of Covington, Ky., held at their banking-house on Wednesday, June 22, 1887 (notice of time and object of said meeting having been sent to each stockholder), there were represented 3,603 of the total 5,000 shares of the capital stock of the said bank, and, by a unanimous vote of the shares then represented, agreed and consent- to accept the provisions of the act of the

legislature of Kentucky, chapter No. 1233, article No. 2, passed at the session of 1886, approved May 17th, 1886.

A. SHINKLE, *President.*
I. D. FRY, *Cashier.*

[SEAL.]

A copy.
Attest: VIRGIL HEWITT,
Assistant and Acting Auditor.

40 At the time of the filing of the petition the following bond for costs was also filed:

Kenton Circuit Court.

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON.

We undertake that the plaintiff shall pay to the defendant and to the officers of the court all costs that may accrue to them in this action in the Kenton circuit court and in any other court to which this action may be carried.

Given under our hands this 14th day of November, 1893.

J. W. BRYAN.

Attest: H. C. HALLAM.

Thereupon a summons issued and was afterwards returned as follows:

The Commonwealth of Kentucky to the sheriff of Kenton county:

You are commanded to summon the City of Covington to answer, in twenty days after the service hereof, a petition in equity in suit No. 542 filed against it in the Kenton circuit court, at Covington, by the First National Bank of Covington, Kentucky, and warn it that upon failing to answer said petition will be taken for confessed, or it will be proceeded against for contempt.

Witness H. C. Hallam, clerk of said court, this 14th day of November, 1893.

H. C. HALLAM, *Clerk.*

Executed the within summons November 17, 1893, by de-
41 livering a true copy of same to J. T. Thomas, mayor of the city of Covington.

Fee, 60c. DAN'L KINSLEY, *S. K. C.*

At a sitting of said court on November 27, 1893, the defendant files a demurrer.

The said demurrer is as follows:

The defendant, The City of Covington, demurs to the petition because it does not state facts sufficient to constitute a cause of action, nor does it state facts sufficient to support a cause of action.

W. McD. SHAW,
City Solicitor.

Thereafter, at the same sitting of said court—

"The judge of this court declines to preside in this case on account of a personal interest in the result. By agreement, the case is transferred to the Campbell circuit court, at Newport."

Kenton Circuit Court.

I, H. C. Hallam, clerk of said court, certify that the preceding pages contain a complete and true transcript of the record in the cause named in the caption.

Witness my hand this December 15, 1893.

H. C. HALLAM, *Clerk.*

At a circuit court, on the 27th day of January, 1894, order was made in words and figures as follows, to wit:

Came the court and filed opinion herein; and defendant's demurrer to plaintiff's petition is overruled and defendant excepts.

42 The opinion referred to in the foregoing order is in words and figures as follows, to wit:

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON.

GERMAN NATIONAL BANK
vs.
CITY OF COVINGTON.

These cases are submitted upon a demurrer to the petition in each case.

The plaintiff in each case seeks to enjoin the defendant from collecting a local tax on a valuation of its franchises.

The tax in question was imposed upon a valuation authorized and made under article III of the act relating to revenue and taxation, which became a law Nov. 11th, 1892, and its collection is resisted upon the ground that this act impairs the obligation of a contract between the plaintiff and the State, whereby, upon the payment of a given tax, they are exempted from the payment of all other taxes.

If such contracts exists, whatever may be the opinion of this court as to the power of the legislature to have made them, the repeated decisions of the court of appeals of this State and of the Supreme Court of the United States sustained the plaintiffs in their contention that the tax may not be collected of them, and they are therefore entitled to the relief they pray for.

43 The contract is based upon the due acceptance, in due form, manner, and time, of the act of the legislature of this State known as the "Hewitt law," which went into effect September 14th, 1886.

That part of the act material to the question in hand is article II. The first section fixes a rate of tax on the shares of stock and surplus in State and national banks and other institutions of loan and

discount, which, in the language of the act, "shall be in full of all tax, State, county, and municipal."

The second and third sections provide the method of ascertaining the amount of stock and surplus, &c. The fourth, fifth, and sixth sections are as follows:

SECTION 4. "That each of said banks, institutions or corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxations whatsoever so long as said tax shall be paid during the corporate existence of such bank."

SECTION 5. "The said bank may take the proceeding authorized by section 4 of this act at any time until the meeting of the
44 next General Assembly: Provided, They pay the tax provided in section 1, from the passage of this act."

SECTION 6. This act shall be subject to the provisions of section eight chapter sixty-eight of the general statutes.

Section eight of chapter sixty-eight reads thus:

"All charters or grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1886, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed; provided, that, whilst privileges and franchises so granted, may be changed or repealed no amendment or repeal shall impair other rights previously vested."

On behalf of the defendant it is not denies that this act and its acceptance constituted a contract, but it is earnestly insisted that the last section above quoted constituted a part of the contract and made the contract binding upon the banks for all time, but binding upon the State at its pleasure only.

Mutuality is essential to all executory contracts; the promise of the one party is the consideration for the promise of the other; if for any reason one is not bound then neither is the other.

There is no reason why, in respect to its contracts, the State occupies any better or different position from other parties to contracts.

The plaintiff-, as national banks, surrender rights and im-
45 munities conferred upon them by the act of the Federal Congress under which they were created, and they were substantial and valuable, as set forth in the petitions herein and as known to the court as part of the current history of the State and as shown by the decisions of the court of appeals in the cases of Franklin County Court *vs.* Deposit Bank of Frankfort, &c., 87 Kentucky, 370, and City National Bank of Paducah *vs.* City of Paducah, 10 Ky. Law

Reporter, 221, and they agreed on their part to pay the increased rate of taxation, and the State agreed on its part that it would pass no law that would authorize and increase of this tax. If it did not agree to do this, it did not agree to do anything, and there is absolutely no consideration to uphold the relinquishment of its rights and privileges the banks enforced under the Federal banking laws, and the statutes which existed before the acceptance of the "Hewitt law" has not been disturbed.

The State made them a proposition limiting the time in which it might be accepted and required a formal acceptance of it. How can the court construe such a contract made by a proposition, duly accepted in all its terms, to include as one of them the right of the State at its will to fail in the consideration which alone would have induced the banks to have entered into the contract. Without this construction it was an assumption of an unerased burden of taxation or peace as to a contraversy which the subsequent decisions of the court of appeals in Franklin County Court *vs.* Deposit Bank of Frankfort demonstrated they were right and the State wrong. With such a construction it is simply an unconscionable bargain.

The act of 1856 reserves the right to repeal or amend unless a contrary interest be therein plainly expressed.

46 It is claimed that the "Hewitt law" would have been governed by it without an express reference to it, and that the reference to it must thereof be held to negative any interest to waive or relinquish the right to amend or repeal.

But in this case the very subject-matter forbids such a construction. Unless the State give immunity from other taxation during the life of the charters of the banks, they gave nothing, and the contract is not binding on the banks and as to them as if *they* had never been a "Hewitt law;" but this court will not so construe the contract. It believes to be a sound principle of law that where the legislature passes an act which cannot be operative as to some of its citizens against their will, and it asks their express written acceptance thereof, offering an inducement therefor, nothing short of the most express and implicit language will authorize its terms as required. And it is certain that a reference to a general law such as the act of 1856 made here will not do it.

Another reason why this tax may not be collected of these plaintiffs is that they are national banks.

This is not a tax on the shares of their capital stock; it is a tax on their franchises.

National banks are the instrumentalities of the General Government to provide a national currency.

To *furnish* the State to tax their franchises is to permit the States to destroy this agency of the Federal Government to accomplish the purposes of that Government.

McCullock *vs.* State of Maryland, 4 Wheat., 317.

Osburn *vs.* United States Bank, 9 Wheat., 739.

47 For these reasons the demurrer will be overruled.

And thereafter, on the 31st day of January, 1894, judgment was rendered in words and figures as follows, to wit:

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON.

The defendant declined to answer herein and, on motion of plaintiff and defendant, this cause is submitted for final judgment.

It is therefore adjudged that the defendant, The City of Covington, its officers and agents, be, and they are hereby, forever enjoined and restrained from distraining or attempting to distrain any of the plaintiff's property for said tax claim of $14,892.43, in the petition herein set forth, and from attempting to collect same or any part thereof, and that the plaintiff recover of the defendant its costs herein. To this judgment the defendant excepts and prays an appeal to the court of appeals, which is granted.

And thereupon, on the 2nd day of December, 1895, mandate was filed in words and figures as follows, to wit:

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON.

Came plaintiff and filed mandate of the court of appeals, which is as follows:

48 COMMONWEALTH OF KENTUCKY:

The Court of Appeals.

CITY OF COVINGTON
vs.
FIRST NATIONAL BANK.

Appeal from a judgment of the Campbell circuit court.

JUNE 1, 1895.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

A. A. ADDAMS, *C. C. A.*,
By ROBT L. GREENE, *D. C.*

Issued October 10, 1895.

STATE OF KENTUCKY,
County of Campbell.

I, A. L. Reuscher, clerk of the circuit court for the county and State aforesaid, do hereby certify that the foregoing 25 pages of typewritten matter and this page contain a full, true, and complete copy of the matters set out in the within-styled action as the same appears of record and remains on file in my office.

Witness my hand as clerk and the seal of said court this the 2nd day of July, 1900.

[SEAL.] A. L. REUSCHER, *Clerk.*

Exhibit "C" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

49 Whereas this the First National Bank of Covington, Ky., in 1893 instituted its action in the Kenton circuit court against the City of Covington, enjoining said city from collecting or attempting to collect any taxes from it or on its capital stock or any of its property other than its banking building, upon the ground that it had a contract with the State of Kentucky under the Hewitt law, whereby, by reason of its payment to said State of its taxes under said Hewitt law, it and its shares of stock were exempt from all other taxation, and said cause having been transferred to the Campbell circuit court, said court so adjudged and perpetually enjoined said City of Covington from asserting or from attempting in any way to collect any tax on the property of this bank or its shares of stock, except its banking building, and the City of Covington appealed from said decision to the court of appeals of Kentucky, and the said judgment of the said Campbell circuit court was by said court of appeals affirmed on June 1, 1895 (97 Ky., page 590), said court of appeals holding that this bank had such irrevocable contract with the State of Kentucky under the Hewitt law; and

Whereas it has by the Supreme Court of the United States been held in the bank tax cases from Kentucky, October term, 1898, vol. 174, U. S. Supreme Court Reports, that—

"An adjudication that an irrevocable contract exists, which precludes the enforcement of a tax law in conflict with the contract, is *res judicata* as to an attempt to enforce such tax law in succeeding years against the parties to such an adjudication;"

50 And as this bank has continued up to the present and intends to so continue to pay its taxes to the State under said Hewitt law, the said city of Covington has no right to assess for taxation its shares of stock or any of its property other than its banking building, and this bank is in no way subject to the provisions of senate bill No. 188 of the 1900 session of the Kentucky legislature, and its president and cashier are directed for these reasons not to list with the city assessor of Covington for taxation any of its shares of stock.

Exhibit "D" referred to in the foregoing bill of complaint was and is in words and figures following, to wit:

EXHIBIT "D."

COVINGTON, KY., *June* 20, 1900.

Mr. Frank P. Helm, president First national bank.

DEAR SIR: Under the late act passed by the last legislature of Kentucky, "in relation to the taxation of national banks," it is my duty to assess all shares of stock in national banks in this city.

You are hereby notified and directed to report to me on or before the 30th day of June, 1900, at my office, 153 Pike street, Covington, Kentucky, and to list with me for taxation for municipal purposes all shares of stock in the First national bank, of which you are president, for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900.

JOHN N. MIDDENDORF,
City Assessor.

51 And on the same day, to wit, on July 23rd, A. D. 1900, there issued out of the clerk's office of said court the following subpœna in chancery, viz:

The President of the United States of America to The City of Covington, a municipal corporation, and John N. Middendorf, the assessor of the city of Covington, Greeting:

You are commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal Court hall, in the city of Covington, on the first Monday in September next, to answer a bill in equity exhibited against you in our said court by The First National Bank of Covington, Ky., a corporation, which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed, at the clerk's office of said court, in Covington, this 23rd day of July, A. D. 1900, and in the 125th year of our Independence.

Attest:

JOS. C. FINNELL,
C. C. C., K. D.

MEMORANDUM.—The defendants to enter their appearance in the suit, in the clerk's office, on or before the 3rd day of September next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

JOS. C. FINNELL, *Clerk.*

52 And on the same day, to wit, on July 23rd, A. D. 1900, a motion for injunction was filed. This motion cannot be found in the record, but there is in the record an acceptance of a notice of said motion, filed on July 25, 1900, which is as follows, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK
vs.
THE CITY OF COVINGTON.

Notice of Application for a Temporary Injunction.

The defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington, are each hereby notified that the

complainant will, upon Tuesday, the 31st day of July, 1900, at 12.15 p. m., in chambers, at the Federal Court building, in the city of Louisville, Kentucky, apply to the Honorable Walter Evans, judge of the United States circuit court for the district of Kentucky, for a temporary injunction, in accordance with the prayer of the bill of complaint herein.

J. W. BRYAN,
Solicitor for Complainant.

Service of the above notice accepted for the defendants, City of Covington and John N. Middendorf, city assessor of said city of Covington.

F. J. HANLON,
Solicitor for said Defendants.

53 And afterwards, to wit, on July 27th, A. D. 1900, the subpœna in chancery issued herein on the 23rd day of July, A. D. 1900, was returned to the clerk's office of said court with the marshal's proceedings thereon endorsed in words and figures following, to wit:

"I hereby certify that I received this writ on the 23rd day of July, 1900, and that I have personally served the same, on the 24th day of July, 1900, upon the said defendants, The City of Covington, by delivering to W. A. Johnson, its mayor, a true copy of the within, and upon John N. Middendorf, assessor of the city of Covington, by delivering to him a true copy of the within on the 25th day of July, 1900. This therefore returned executed as the law directs this 23rd day of July, 1900.

Fee, $4.00.

A. D. JAMES, *U. S. M.*,
By J. D. COMPTON, *D. M.*"

And afterwards, to wit, on August 14th, A. D. 1900, an entry was made on the journal of said court, clothed in words and figures following, to wit:

Journal "H," page 660.

This day came the plaintiff, by J. W. Bryan, its counsel, and, with leave of the court, filed its amended bill of complaint herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any
54 of its shareholders until the further order of the court. Pending said motion the defendants came, by F. J. Hanlon, W. H. Julian, and Harvey Myers, their counsel, and with leave of the court tendered and filed a plea to the jurisdiction of the court of this action, and with like leave of the court were also permitted now to file a demurrer to the bill of complaint, as amended, but neither said plea nor said demurrer was set down for argument; and the said motion of the complainant for the temporary injunction afore-

said coming on to be heard was argued by counsel, and the court, being sufficiently advised, delivered an opinion in writing, which is order- to be filed, and pursuant thereto it is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law and to what extent. Service of this order shall be made upon the defendants by delivering to each of them a copy hereof.

55 Said amended bill of complaint referred to in the foregoing entry was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON
vs.
THE CITY OF COVINGTON ET AL. } Amended Bill of Complaint.

The complainant, by leave of court first had and obtained, amends its bill of complaint herein as follows, to wit:

Your orator says that by mistake it was stated in its original bill that during years 1893, 1894, 1895, 1896, and up to first of July, 1897, its capital stock was five hundred thousand dollars, when the amount of its capital stock during said period was six hundred thousand dollars.

Your orator says that said act of the legislature of Kentucky of March 21, 1900, set forth in its original bill herein, is invalid and void and obnoxious to and inconsistent with the provisions of section 5219 of the Revised Statutes of the United States. Said act of March 21, 1900, is not in conformity with said section 5219 of the Revised Statutes aforesaid, in that the said act, by section two thereof, undertakes to make complainant and other national banks in the State of Kentucky liable for the taxes to be assessed against and collected upon the shares of stock thereof, and by section three of said act it is undertaken to authorize and empower the defendant City of Covington, and said defendant has the right,

56 power, and authority thereunder to assess the shares of stock of this complainant for all the years from 1893 to the present year, 1900, both inclusive, as well as in the future, and to make complainant liable for said taxes, notwithstanding the fact that com-

plainant, as in its original bill set forth, has regularly paid its taxes, as by its said contract agreed and in accordance with the provisions of the Hewitt law, each and every of said years to the State of Kentucky, and notwithstanding the fact that the capital stock of complainant was decreased from six hundred thousand dollars to three hundred thousand dollars upon the first day of July, 1897, and complainant paid one hundred dollars upon each share of said reduction of three hundred thousand dollars to the owners of the said shares of stock of complainant at said time, and that complainant hath regularly during each and every of said years semi-annually paid to its then shareholders its current earnings and profits by way of dividends, and notwithstanding the fact that many of the shares of stock of complainant have changed ownership during said years and in many instances during said time holders and owners of its shares of stock have died and their said stock has been distributed among their heirs or legatees and in other instances sold and the proceeds applied to the payment of the debts of its said shareholders, and during said years many of its shareholders were non-residents of the State of Kentucky, who in many instances have sold and transferred their shares of stock during said time. All of which statements complainant avers to be true. During said years there was no law in the State of Kentucky providing for the assessment of its shares of stock or any law authorizing municipal taxation thereof.

57 Your orator, further complaining, showeth unto your honor that said act of March 21, 1900, undertakes to and does discriminate against complainant and other national banks in the State of Kentucky and deprives them of the equal protection of the laws, for that it says that there is not now, and has not been during any of said years, any statute or law in Kentucky under which the shares of stock in State banks are to be assessed or taxes collected thereon, as is attempted to be done upon shares of stock in national banks located in Kentucky by said act; and your orator further shows that the only general law in the State of Kentucky under which the State banks are assessed for taxation is the revenue law of 1892, the provisions of which are set forth in its original bill herein, under which said State banks are assessed for and pay a franchise tax, the amount thereof being ascertained by the said State board of valuation and assessment, as in its original bill set forth. Your orator says that the legislature of Kentucky, by an act approved March 19, 1898 (Session Acts 1898, page 96, of the General Assembly of the Commonwealth of Kentucky), provided that the franchise of all banks, State and national, in cities of the first and second class, should be assessed for taxation for city purposes by such city officer as made the assessment for taxation in said cities—that is, that act conferred upon such cities the power of assessment given by the revenue law of 1892 to the State board of valuation and assessment; and your orator further shows that the legislature of Kentucky, by an act which became a law upon March 23, 1900, without the signature of the governor (Session Acts, page 89), amended said act of 1898, by which amendment it

58 was undertaken to authorize the assessment for taxation by cities of the first, second, and third class in Kentucky of the

shares of stock in every incorporated bank located in said cities, while the said act of March 21, 1900, under which the defendant City of Covington is attempting to proceed against complainant, provides for the assessment for taxation of the shares of stock of all national banks in the State of Kentucky, wheresoever located, being entitled "An act relating to taxation of the shares of stock of national banks," and while the shares of stock in State banks are assessed only in cities of the first, second, and third class in said State; and your orator says that there are many State banks located in and doing business in the State of Kentucky outside of cities of the first, second, and third class-.

Wherefore your orator says that said act of March 21, 1900, is not in conformity with, but is contrary to, the laws of the United States relating to national banks, and is a discrimination against complainant and other national banks located in the State of Kentucky; and complainant further says that said act is invalid, illegal, and void, and contrary to the provisions of the Constitution of the United States, in that it is an attempted impairment of the obligations of the contract between complainant and the State of Kentucky, and an attempted taking of the property of complainant without due process of law, and a taking of the private property of complainant and its shareholders for public use without just compensation, which is in violation of the provisions of articles V and XIV of the amendments to the Constitution of the United States, and an attempt
59 to enforce said act of March 21, 1900, would be an abridgement of its privileges and immunities and a denial to it of the equal protection of the laws, and in violation of article XIV of the amendments to the Constitution of the United States.

And your orator files herewith as part of this and its original bill, as evidence in this case, a certified copy of all the orders, the judgment, and opinion and holding by the court of appeals of Kentucky, upon the said appeal by the defendant herein, City of Covington, against complainant, referred to in complainant's original bill, and marks said copy Exhibit "X."

Wherefore your orator prays your honor to grant unto it the injunction asked for in its original bill, restraining and enjoining the said City of Covington and all of its officers from in any way assessing or attempting to assess for taxation by said city the shares of stock of complainant or any of them, or to hold complainant liable for the taxes thereon for the years 1893, 1894, 1895, 1896, 1897, 1898, 1899, and 1900, or any of said years, or for any future year or years, and prays that it be adjudged that the contract entered into by and between it and the State of Kentucky, whereby its shares of stock and all of its property other than its banking building and real estate are exempt from any taxation by the defendant City of Covington for and during its corporate existence, was an irrevocable one, and that such contract is irrevocable, is *res judicata;* that said act of the legislature of Kentucky of March 21, 1900, be declared illegal, null, and void in whole and in part; that it may have judgment for its costs. It prays as in its original bill and for any

60 and all other and further relief that to it in equity and good conscience belongeth in the premises.

J. W. BRYAN,
Solicitor for the Complainant.

UNITED STATES OF AMERICA,
State of Kentucky, County of Kenton, } ss:

Frank P. Helm makes oath that he is the president of The First National Bank of Covington, Ky., complainant herein, and that the statements made in the foregoing amended bill of complaint as of his own knowledge are true, and those on information he believes to be true.

FRANK P. HELM.

Sworn to and subscribed before me by Frank P. Helm on the 9th day of August, 1900.

R. K. TARVIN,
Notary Public, Kenton Co., Ky.

My commission expires Jan'y 8th, 1902.

Said exhibit referred to in the foregoing amended bill of complaint was and is in words and figures following, to wit:

EXHIBIT "X."

Pleas before the honorable court of appeals of Kentucky, at the capitol, in Frankfort.

61 At a court of appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 25th day of October, A. D. 1894, the following order was entered herein:

CITY OF COVINGTON
vs.
FIRST NATIONAL BANK OF COVINGTON. } Campbell.

Ordered that the foregoing causes be continued for oral argument.

Afterwards, to wit, on the 5th day of March, A. D. 1895, the following order was made herein and in consolidated causes:

By agreement of all the parties and on their motion, it is ordered that these 17 causes be heard together; and said causes, coming on to be heard, were argued by A. P. Humphrey, for the banks, and Ira Julian, for the Commonwealth, counties, and cities, and laid over until tomorrow for further hearing.

Afterwards, to wit, on March 6th, A. D. 1895, the following order was entered herein and in the consolidated causes:

These causes, again coming on to be heard, were argued by D. W. Lindsey, for the banks, and Wm. McD. Shaw and Hugh Rodman,

for the counties and cities, and laid over for further hearing on tomorrow.

Afterwards, to wit, on March 7th, A. D. 1895, the following order was entered herein and in the consolidated causes:

62 These causes, again coming on to be heard, were argued by William Goebel, for the banks, and H. C. Barker, for the cities and counties, and laid over for further hearing on tomorrow.

Afterwards, to wit, on the 8th day of March, A. D. 1895, the following order was made herein and in the cases consolidated with it:

These causes, again coming on to be heard, were argued by John W. Rodman and T. L. Edelen, for the banks, and laid over for further hearing on tomorrow.

Afterwards, to wit, on the 9th day of March, A. D. 1895, the following order was entered herein and in the cases consolidated herewith:

These causes, again coming on to be heard, were argued by James P. Helm, for the banks, and laid over for further hearing on next Tuesday.

Afterwards, to wit, on the 12th day of March, A. D. 1895, the following order was entered herein and in the causes consolidated herewith:

These causes, again coming on to be heard, were argued by W. J. Hendrick, for the Commonwealth, and submitted.

Afterwards, at a court of appeals held, as aforesaid, on the first day of June, A. D. 1895, the following judgment was entered:

63 CITY OF COVINGTON, Appellant,
vs.
FIRST NATIONAL BANK OF COVINGTON.

Appeal from Campbell circuit court.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

Judges Lewis, Paynter, and Guffy dissenting.

The following is a copy of the opinion delivered by the court, through Chief Justice Pryor, on the 1st day of June, 1895:

The Bank of Kentucky, the Northern bank, the Farmers' bank, and other State banks, the National Bank of Covington, and other national banks are in this court by their presidents and directors, some of them appealing from judgments imposing upon them taxa-

tion for county and municipal purposes, and others standing as appellees in cases relieving them from such local burdens.

The legislation imposing such burdens is found in the Kentucky statutes under the title of revenue and taxation, and is based on secs. 174 and 175 of the present constitution.

Section 174 provides:

"All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this con-
64 stitution shall be construed to prevent the General Assembly from providing for taxation based on incomes, licenses or franchises."

Section 175 provides:

"The power to tax property shall not be surrendered or suspended, by an- contract or grant to which the Commonwealth shall be a party."

It is manifest by reason of section 175 the right of the legislature no longer exists of surrendering the power to tax property, or by contract to bind the State to any other mode of taxation than that found in the constitution, and all property, whether belonging to corporations or individuals, must pay the same rate of taxation.

The appellants in these cases (the banks) are claiming that prior to the adoption of the present constitution a contract had been entered into between them and the State, by which, in consideration of the surrender by them of certain rights found in their respective charters, and by their consent and agreement to pay a larger State tax than individuals paid or their charters required, the State agreed not to impose upon them any local burdens, and the important inquiry in these cases is, Was such a contract entered into between the banks and the State based on a consideration binding the State on one side and the banks on the other?

The statute under which this contract is claimed to have been made is found in the general statutes, under the title of revenue and taxation, secs. 1 and 4 of art. 2, and known as the Hewitt bill. Counsel for the banks in the discussion of these cases classified the banks as follows: 1. The banks chartered prior to the act of 1856, when the power to amend or repeal was not a part of the charter or reserved by any general law. 2. Banks chartered after that
65 date, when by a general law the right to amend or repeal the charter was expressly reserved. 3. The national banks. We shall treat all the cases as one in considering the application of the Hewitt act to the banks accepting its provisions.

Prior to the adoption of the present constitution it seems to have been the settled policy of the State to exempt banking institutions from local taxation and requiring them to pay a larger tax to the State upon its property than that paid by the individual tax-payer, and this additional tax went into the State treasury instead of being applied to municipalities in the discharge of local burdens. The framers of the constitution, not approving of this policy, established a fixed rule of taxation and made all taxation alike upon property,

whether for State or municipal purposes, applying the rule for municipal purposes to the territory in which the tax is imposed. It is argued, and no doubt true, that a discrimination must exist between banks located where heavy local burdens are imposed and like institutions in more favored localities where lighter or no local burden exists, and while the fact that the banks in the commercial centers of the State are taxed two and a quarter dollars on the hundred under the present system (local and State) and those in an adjoining town or county only one per cent. may work a hardship and prevent competition or drive the banks thus heavily taxed to locate elsewhere, yet this under the old system was a question of policy only, and the farmers of the present constitution in adopting the ad valorum system left no room for classifying property, so as to make any discrimination in the subjects of taxation, and the suggestion of counsel can only be considered in determining the intent of the legislature in passing the Hewitt act and that of the banks in accepting it.

66 It may be well, however, to ascertain the condition of the banks (and particularly those chartered before the year 1856) with reference to taxation and the circumstances attending the legislation resulting in the passage of the Hewitt bill in order to ascertain whether or not it was the purpose of the State to surrender in part its power of taxation and that of the banks to relinquish any right they could have asserted against the State by reason of their charters. The banks in existence prior to the act of 1856 were claiming their charter contracts, by which only a tax of fifty cents on each share of one hundred dollars of stock could be imposed.

The national banks claimed they were entitled to be taxed like the State banks and were not liable for local burdens, and, besides, that their surplus, if in greenbacks or other non-taxable securities, could not be taxed under their charters from the Federal Government.

The State claimed the old banks were taxed for too small an amount, and the banks chartered since the year 1856 were resisting any discrimination between such institutions and the old banks. Under these circumstances the legislature devised a mode of taxation that prevented a discrimination that would otherwise exist, and by the provisions of the Hewitt bill said to all banks, State and national, we will impose a tax of seventy-five cents on each share of your capital stock equal to one hundred dollars, and, in addition, a tax on your surplus, and this shall be in full of all tax—State, county, and municipal—provided you will accept the act imposing the tax with the conditions annexed.

This act reads:

67 "Shares of stock in State and national banks and other institutions of loan and discount, and in all corporations, required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay on each one hundred dollars of so much of their surplus, undivided

surplus, undivided profits, or undivided accumulations, as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal."

The seventh section of the act further providing that—

"Nothing herein contained shall be construed as exempting from taxation for county or municipal purposes, any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of this act provides:

"That each of said banks, institutions and corporations, by its proper corporate authority with the consent of a majority in interest of a quorum of its stockholders at a regular meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement with the State of Kentucky shall be evidenced by writing under the seal of such bank, and delivered to the governor of this Commo-
68 wealth, and upon such agreement and consent being delivered and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever, so long as said tax shall be paid, during the corporate existence of such bank."

Section 5 of this act provides:

"The said bank may take the proceedings authorized by sec. 4 of this act, at any time, until the meeting of the next General Assembly: Provided, they pay the taxes provided in sec. 1 from the passage of the act."

Section 6 provides:

"This act shall be subject to the provision of section 8, chap. 68, General Statutes."

The banks involved in this litigation accepted in writing the provisions of the act and filed their written acceptance with the governor under their corporate seals. The banks incorporated before the act of 1856 surrendered what they claimed to be their charter contracts, by which they were taxed only fifty cents on their shares of stock of one hundred dollars. The national banks yielded their right to deduct from the value of their stock their surplus consisting of non-taxable securities and their claims to be taxed as the old banks, and most of the State banks uniting to prevent any discrimination, all accepting the proposition made by the State and agreeing to pay seventy-five cents on each share of stock of one hundred dollars in value and the additional tax mentioned in the article.

It is conceded by counsel for the City of Louisville (and we think it clear) that prior to the passage of the Hewit bill, in the
69 year 1886, the Bank of Kentucky had an irrevocable contract to be taxed at the rate of fifty cents on each share of one hundred dollars, and the same may be said of all the banks chartered prior to the act of 1856; but it is further contended that the

act as well as the contract under it were both subject to repeal by reason of the reserved power contained in sec. 6 of art. 2. Again, it is contended by counsel for the city of Frankfort that the grant to the banks was without any consideration, and the renewals of the charter of the old banks, as they are designated, placed them within the provisions of the act of 1856, and by the attorney general that the State had no power to surrender this right of taxation, and the contract, if made, is not binding.

This court in the case of The Franklin County Court *vs.* Bank of Kentucky, reported in 87 Ky., 370, in an opinion delivered by Chief Justice Bennett, held that the renewals of those charters did not affect the contract made with the State under the original grant; and if disposed to reconsider the decision rendered in that case, it could not affect the issue involved on the present appeals. At the date of the passage of the Hewitt bill the Franklin circuit court had decided that the charter contract still existed, and after the acceptance by the banks of the provisions of the Hewitt bill that court affirmed that judgment. It is apparent that art. 2 in the Hewitt bill was adopted by the legislature with a view of equalizing the burdens of taxation as between the banks and to relieve them from the burden of local taxation during their corporate existence, but it is insisted there was no consideration for this partial exemption.

If there was a binding contract between the old banks and
70 the State to pay a tax of only fifty cents on each share of stock and these banks surrendered their contract or their right under it and agreed to pay seventy-five cents to the State instead of forty-two and one-half cents, it seems to us this would be a wise consideration, sufficient to uphold any such contract with the State, if the power existed with the State to make it, and the fact that such power existed has been too often decided by this court, as well as the Supreme Court, to require authority in support of it. It is plain also that these banks, including the national banks, surrendered their rights not only to settle the question as to local taxation, but to prevent competition or any discrimination between banks located in the commercial centers of the State and those outside of such localities, while no heavy burdens for local taxes were being levied, and therefore the consideration moving from the old banks was for the benefit of all the banks accepting the terms of the contract. The legislature was attempting to avoid all discrimination between these monied institutions, and therefore its exactions from the old banks and the national banks being acceded to, it resulted to the benefit of the banks organized after as well as before the act of 1856, as to such banks uniting with the old banks in accepting the Hewitt bill. In this statute, imposing the tax of seventy-five cents and its acceptance on the conditions proposed, there exists every element of a contract between the State and the banks, and with such a consideration as will uphold it no reasonable doubt can be entertained that such was the purpose of the parties to it.

It is contended that if a contract was entered into the provisions

of the present constitution and subsequent legislation under
71 it operated to repeal not only the statute, but the contract made by virtue of its provisions, and this power existed by reason of the sixth section of the article, making it subject to the provisions of sec. 8, chap. 68, General Statutes, declaring that this—

"Shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

Assuming, as we think was the legislative intent, the word act in section 3 of the Hewitt bill was used as synonymous with the word article, and therefore the reservation of the power on the part of the legislature was the right to amend or repeal the article in which is contained the proposition by the State to the banks in reference to taxation, it by no means follows that a contract made by virtue of its provisions can be abrogated at the will and pleasure of the legislature. The distinction between the power of the legislature to repeal an act and the right to annul, by repeal or otherwise, a contract made under it is manifest, and while under our present constitution the State can make no contract by which the exercise of the taxing power can be lessened or any part of its sovereign power in that regard relinquished, under the former constitution property might not only be classified in imposing taxation, but the State could discriminate between the classes when providing the rate of taxation, and this doctrine has been recognized by numerous decisions of this court and sustained in like cases by numerous
72 decisions of the Supreme Court.

The general rule in regard to legislation is that one legislative body cannot bind a subsequent legislature to its action in purely legislative matters, but when it comes to matters of contract, if the State hath the power to make it, its terms and conditions are as obligatory on the State as if entered into between two of its citizens, and an attempt to cancel such a contract, without the consent of the party with whom it is made, is in direct violation of that clause of the Federal Constitution providing that "no State shall * * * pass any law impairing the obligation of contracts" (section 10, art. 1, U. S. Const.).

That the State may enter into such contracts was held by this court as early as the year 1839, in the case of Johnson *vs.* Commonwealth, reported in 7 Dana, 342, where there was an effort to tax the shares of stock in a bank in excess of the terms of the contract, and this court held that the contract placed a limitation on the power.

In the case of the Farmers' Bank *vs.* Commonwealth, reported in 6 Bush., 127, it was held the bank could not be taxed beyond its charter rate as fixed by the contract, and in the late case of The City of Frankfort *vs.* The Bank of Kentucky and others, reported in 87 Ky., 370, the same doctrine was announced.

The question then arises, Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legis-

lature or the farmers of the Constitution to disregard this contract between the banks and the State? We are satisfied, after a careful consideration of this question, that the parties making it
73 never contemplated or intended that the act of 1856 should apply to this contract after its acceptance by the banks, and that such an acceptance was necessary to make the contract complete between the parties. The legislature at the time this contract was made recognized the right of the Bank of Kentucky and the banks chartered prior to 1856 to stand upon their charter rights, or, if not, the right of the banks as against the State or this subject of taxation had found its way to the courts and had been decided adversely to the State. The legislature thought the tax of fifty cents too small. The old banks claimed an irrevocable contract. The national banks could only be taxed as authorized by the Federal Congress. The new State banks were subject to such taxation as the State might see proper to place upon them, and to make them liable for these local burdens would be to end their existence or cause them to seek shelter under the Federal banking act, and with a view of placing the entire matter at rest and placing the banks on an equal footing the legislature said to all of the banks:

"If you will agree to pay seventy-five cents on each share of stock equal to one hundred dollars, etc., it shall be in full of all tax, State, county, or municipal."

It said to the old banks:

"You must relinquish your right to a smaller rate of tax, and this must be done, not by your president and directors, but by the consent of the stockholders in writing and delivered to the governor as evidence of your good faith."

The banks accepted the proposition made them in the manner pointed out by the act, and from that time to the adoption of the present constitution the contract was adhered to by both the
74 State and the banks. It is now argued the banks, and particularly those with charter contracts for a smaller rate of taxation, surrendered those charter rights and agreed to pay a higher rate of tax under an act that authorized any subsequent legislature to repeal the contract at its will and pleasure. No rational view of this agreement should lead to the conclusion that business at the head of these institutions would relinquish every right they had required under their charters that an increased burden might be placed upon the banks they represented.

In the contention that the sixth section of the article reserves this power of repeal counsel overlooked the fact that by the express terms of the section by which this reserved power is retained it is provided that "no amendment or repeal shall impair other rights previously vested." The execution of the agreement between the State and the banks, based on a consideration such as appears from the act itself, connected with its acceptance by the banks, vested in the latter rights of which they could not be divested without their consent, the chief of which was the payment of a specified tax to the State during their corporate existence.

The State waived its right to tax these banks for local purposes

(except their realty), and required in lieu thereof an additional tax to be paid into the State treasury. In this way the State granting the franchise derived the benefit instead of the municipal government, while under the present system the difference between forty-two and one-half cents and seventy-five cents, with tax on surplus amounting to one hundred and twenty-five thousand dollars, is taken from the revenue proper and applied to the mu-
75 nicipalities where the banks are located.

In the case of Commissioners of Sinking Fund *vs.* Green & Barren River Navigation Company, reported in 79 Ky., 73, this court held, with the act of 1856 in full force, that the State had no power to annul a contract that had been executed between the State and the company, and that the repeal of the charter to the extent — it deprives the company of its contract rights acquired under it was in violation of the constitution. In that case the court said:

"We cannot assent to the doctrine that will allow the State to alter or abolish such contracts whenever, in the opinion of the legislature, the necessities of the public or the interest of the State require it."

The case of The Commonwealth *vs.* Owensboro, &c., R. Co., 95 Ky., 60, determines, in effect, the question involved here. In the year 1884 the legislature passed an act to encourage the construction of railroads, and in doing so relieved them from taxation for a limited period. The act provided:

"That all railroads which may hereafter be built within the Commonwealth under existing charters, or under charters which may hereafter be granted, shall be exempt from all taxation under the laws of this Commonwealth for the period of five years, from the date of the beginning of the *constitution* of the new roads."

The State claimed the right under the act of 1856 to repeal the law, claiming this had been done by legislation, as in the case before us, and attempted to coerce payment of taxes when the five years from the beginning of the construction of these roads had not ex-
pired.
76 The court, in response to the argument to exact the tax and the application of the act of 1856 to its provisions, said:

"It is sufficient to say of this proposition, which, even at first blush, strikes us as extraordinary and unjust if attempted to be applied to those of the appellees who accepted the offer of the State and expended their money on its exemption pledge, that the act of 1856, reserving the right to repeal or amend charter privileges granted by the legislature to particular persons, has no application to the law of 1884, which, as said before, was a general law and affected all alike who accepted its provisions or acted on the strength of them."

Counsel for the local governments argued the questions involved as if there was a perpetual grant to these corporations, and therefore the power of repeal must of necessity have been reserved. The limitation of the grant extends to the life of the corporate charter, and with the banks existing prior to the act of 1856 their charters expire in ten or twelve years, and hence the policy of the State, if

viewed in that light, was wise, because it was increasing the State revenue from fifty to seventy-five cents for a fixed and certain period.

The framers of the constitution, in adopting that instrument, were not looking to past legislation on this particular subject, but were creating an original law for the future welfare of the State, leaving the rights of those protected by either the State or Federal constitutions undisturbed, and if the attempt to repeal vested rights had been made, the *far*mers of the present constitution would have been as powerless to accomplish such a purpose as the legislature
77 in session after its adoption.

The Supreme Court decided a somewhat similar question on a writ of error to the court of appeals of New Jersey in the case of New Jersey *vs.* Yard, reported in 95 U. S., 110. By an act of the legislature passed in March, 1865, the legislature of New Jersey enacted that the Morris & Essex Railroad Company should pay a tax of one-half of one per cent., to be paid by the company to the State whenever the net earnings of the company amount to seven per cent. on the cost of the road, to be paid at the expiration of one year from the time when the road shall be open and in use to Phillipsburg and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation and imposition whatever by or under the contracts of this State.

The twentieth section of the original act of incorporation reserved to the legislature the right to alter, amend, or repeal the act whenever it should think proper. The act of 1865 was an amendment to the original grant, and in regulating the amount of taxation contained this proviso:

"Provided, that this section shall not go into effect, or be binding on the company, until the said company, by an instrument duly executed under its corporate seal, and filed in the office of the secretary of state, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act, or this act shall be void."

Chief Justice Miller, in delivering the opinion in that case, said: "The main question here is, Did the legislature intend to make such a contract?" and held that "its meaning and its terms are clear enough, and, taken alone, no one denies but that it is a con-
78 tract which would be protected by the Constitution of the United States." And in like manner will the contract in question be upheld.

And, as said Mr. Justice Miller in New Jersey *vs.* Yard:

"The legislature was not willing to rest this contract in the usual statutory form alone, depending on its validity as a contract upon some action of the corporation under it to bind it to its terms, but they required of the company a formal written acceptance within sixty days, else it became wholly inoperative."

And it may be said in the New Jersey case there was no consideration other than is found in ordinary railroad charters.

It is said, however, in that case the repealing clause, or what is known in this State as the act of 1856, was appended to the original

charter, and when amended it formed no part of the amendment, as is found in this case, and therefore the court concluded the amendment was not subject to repeal.

The question is asked, Why the necessity of making the act of 1856 apply to article 2 if the legislature did not intend to reserve the right of annulling the contract? In response to this it might be asked, If such was the legislative intent, why the necessity of having a formal written acceptance from the banks, surrendering all their respective charter rights, and in consideration therefor agreeing to tax them seventy-five cents on the hundred dollars so long as their charters continued, if the power was reserved of abrogating the contract at any moment? If such was the legislative purpose, there
79 could have been no necessity for any consideration moving from the banks or any formality attending the execution of the contract.

The act of 1856 was enacted to avoid the effect of the decision of the Supreme Court in the Dartmouth College case, reported in 4 Wheat., 518, to enable the sovereign power to amend and repeal charter provisions that had theretofore been regarded as beyond the power of the legislature without such a reservation, but under this act of 1856 it has been held by this court, as well as every other court having the question before it, that property rights or contract rights acquired by virtue of the charter in exercising the privileges conferred could not be interfered with by legislation, and in fact the act expressly provides "that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

The old banks had contract rights, sustained by the adjudications of the court of the State, that exempted them from local taxation, and the same adjudication was had in regard to national banks, although the cases as to the national banks were decided subsequent to the passage of the Hewitt bill (City National Bank of Paducah *vs.* The City of Paducah, 10 Ky. L. R., 221; Covington City National Bank *vs.* City of Covington, 21 Fed. Rep., 484).

The legislature saw the obstacle in the way of increasing the taxation on these banks, and, the national banks standing on the same footing with the State banks, it became apparent that it was to the interest of the State to hold out inducements to all the banks that equality as between them might exist, and at the same time increase the taxation. The banks had not asked for any amendments
80 to their charters, nor was the effort made by the legislature to repeal or amend the charters. The State was attempting to enact a general law, entitled revenue and taxation, applying to all subjects of taxation and to all kinds of property. The tax in regard to banks, under this general title, was fixed at seventy-five cents as to all banks, and as to all corporations, required by law to be taxed on their capital stock, and as to the old banks and the national banks the surrender of these rights was made to depend upon their acceptance of the proposition made to them by the State, by the terms of which they were to pay the tax imposed by the

Hewitt bill and be released from other taxation so long as their charters continued.

Why, then, did the legislature annex to article 2 of the revenue bill the provisions of the act of 1856? No contract had been made when the bill passed, as there had been no acceptance by the banks, and not until the adjournment of the legislature was the contract consummated. It was provided in article 2 that the acceptance had to be made before the legislature again assembled, and the act of 1856 could only have authorized the reservation of power to repeal or withdraw this proposition if, within the period fixed, there was no acceptance by any of the banks of its provisions.

The right to the franchise or the exercise of the privileges granted was not involved in the legislation, but the banks, with their charters in full force, were asked by the legislature to make an agreement as to a rate of taxation that could not have otherwise been enforced against either the old banks or the national banks.

The corporations had the right to contract by reason of their charters, and, dealing at arm's length with the State, accepted
81 the terms and conditions offered in good faith, and the question here is, not the right of the State to repeal or amend their charters, but the right of the State to cancel this contract without the consent of the banks.

The right of the State to repeal the franchise or amend the charter is not here questioned when subject to the act of 1856, but the repudiation of a contract will not be sanctioned.

There was, in fact, necessity for the State to apply the act of 1856 to article 2. Other corporations, as well as banks organized since 1856, were liable to this tax, whether they accepted the provisions of the Hewitt bill or not, and section 4 was inserted for the express purpose of creating a contract between the old banks and the national banks on the one side, and the State on the other, by which the taxation on these banks might be increased, and at the same time placing all the banks accepting its terms on the same footing. If no acceptance had been made there was no reason why the act could not have been enforced as against these corporations coming within the act of 1856; but neither the banks nor the State ever intend- to perform such an idle act as entering into this solemn agreement that might be disregarded by the State whenever its representatives saw proper.

The rule is, if a statute is susceptible of two constructions, that which is consistent with public policy will be followed and no meaning given a statute that will lead to an absurdity.

The case before us is much stronger for the banks than that of New Jersey *vs.* Yard. Here the old banks had contract rights,
82 sustained by the adjudication of the courts of the State, to the effect that they were not liable to local taxation, and the same adjudication followed in reference to national banks. The contract was not only executed, but based on a valuable consideration. If there were any doubt as to its meaning, that doubt would be construed for the State; but when considering the entire article, the intention of the legislature, it seems to us, is manifested. This

increased tax under the former constitution, as before stated, went to the State and not to the municipalities. Such was the policy of the State when the contract was made, and we perceive no reason for abrogating its terms, so as to withdraw from the State treasury this additional tax the banks have been paying, amounting to $125,000 annually, and transfer it to the cities to aid in discharging local burdens.

It requires no judicial utterance to show that under the national banking act, where the rate of interest is fixed at six per cent. (or as the State law provides) and a forfeiture of the entire interest if more is charged, that these banks, by the imposition of local burdens, cannot be taxed as much as two and one-half per cent. in any locality when the average taxation of State banks will not exceed half that sum.

In the case of Lionberger *vs.* Rouse, reported in 9 Wall., 468, after the national banking system went into effect, the legislature of Missouri passed a law authorizing the banks of issue in that State, ten in number, to enter into the new system. Eight of those banks became national banks and two of them declained to do so. The two old banks, as the Supreme Court of the United States held in that case, had a contract right with the State not to be taxed exceeding one per cent. and the State was powerless to increase this tax.
83 The assessment of the plaintiffs' shares of stock in the national bank was at the rate of nearly two per cent. It was contended that this was an unjust discrimination in favor of the two State banks, and the Supreme Court said: As the national bank or its shares was not taxed for a greater sum than other moneyed institutions of the State, and the State was powerless to change its contract with the two remaining banks of issue, it was not such a discrimination as would authorize the court to interfere.

While there are exceeding sixty State banks, the Bank of Kentucky and its branches, the Northern bank and its branches, the Bank of Louisville, and the Farmers' Bank of Kentucky and its branches were at the time of the passage of the Hewitt bill and are now regarded as the prominent banking institutions of the State, and if with their capital and business rank placed before the Supreme Court, with a tax of only one per cent. and the tax on the national banks placed at two per cent., the judgment of the Supreme Court upon such a state of fact doubtless would have been similar to the decision of the court in the case of The National Bank *vs.* The City of Paducah, 10 Ky. L. R., 221.

The case of Lionberger *vs.* Rouse, 9 Wall., 468, has no bearing on this question of contract. Here the State was not powerless to remedy the evil or prevent the discrimination complained of in the Missouri case. The legislature devised a mode by which this discrimination could be removed, however great or even insignificant the difference in taxation might have been. The national banks, recognizing the fact they could be taxed as other moneyed capital and desiring uniformity of taxation and not one rate for one bank and a
84 different rate for another, surrendered their right or claim to be taxed as the old banks were taxed and entered into this

agreement by which a uniform system of taxation was adopted for all banks, such as the State desired.

The claim of the old banks and the national banks as to the mode of taxing them was certainly not without foundation for the reasons already given, and the proposition by the legislature to settle these differences, and its acceptance, was a wise and just solution of the whole question.

The case presented by this legislative repeal is the opposite of the legislation in the Missouri bank causes. In the one case there was no legislation making the discrimination, while in the case before us the State, after placing the banks, State and national, on the same footing as to taxation, by the consent and agreement of all the parties to the contract, is now insisting upon a legislative re-cission of the contrary, and placing the old banks at least in a position where they are to pay only fifty cents on the shares of a hundred dollars, and leaving the national bank subject to a greater rate of taxation.

This repeal, *is* sustained, is in effect the creation of three or more new banks, with a rate of taxation much less than that imposed on the national banks, and making a discrimination in favor of the old banks and their branches that gives them a monopoly of the banking business of the State.

The old banks, with a capital of five millions at the time the Hewitt bill passed, will be relegated to the condition they were when the contract was made, as was held by the Supreme Court in the case of The Water Company *vs.* Clark, reported in 143
85 U. S., 1, and that is an exemption from local burdens with a tax of one-half of one per cent. to the State. The national banks, with a capital of ten millions when the Hewitt bill was enacted, and now increased to twenty millions, will also be exempt from local burdens, because the State, in the exercise of the power it now claims, had abandoned the contract under which taxation was equal and uniform, and voluntarily made an unjust discrimination when in its power to prevent it. Such consequences would be disastrous to both the State and the municipalities, the State losing the increased tax, and the municipalities (or the legislature for them) without power to impose on national banks local burdens.

The banks have all, practically, accepted the provisions of the Hewitt bill, and the legislation repealing or canceling the contract, being in violation of both the State and Federal constitutions, leaves the Hewitt bill, as to the banks, in full force, and they must be taxed under its provisions until the contract terminates.

These moneyed institutions are now paying, including tax on surplus and realty, eighty cents, or about that sum, on each share of stock of one hundred dollars, while the citizen tax-payer is paying only forty-two and one-half cents, and at last it is a question whether this difference in the taxation is to be paid by the banks into the State treasury, as under the old constitution, or to the municipalities, under the new constitution.

In the absence of this contract it would go to discharge local burdens, but with this contract in full force it must be paid, as to the

amount and manner, as provided by the Hewitt bill of 1886, into the treasury of the State.

It results, therefore, that the judgments in the case of The Louis-
86 ville Banking Co. *vs.* City of Louisville, Third National Bank *vs.* City of Louisville, Northern Bank of Kentucky *vs.* Bourbon County, Deposit Bank *vs.* Franklin County, Bank of Kentucky *vs.* Armstrong, Bank of Kentucky *vs.* City of Frankfort, Farmers' Bank *vs.* City of Frankfort, Same *vs.* Franklin County, and Same *vs.* City of Henderson are reversed, and The City of Louisville *vs.* Bank of Kentucky, Commonwealth *vs.* State National Bank, Same *vs.* Frankfort National Bank, Same *vs.* Deposit Bank, Same *vs.* Bank of Kentucky, City of Covington *vs.* German National Bank, Same *vs.* First National Bank, and Commonwealth *vs.* Farmers' Bank are each and all affirmed.

COMMONWEALTH OF KENTUCKY:

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the foregoing twenty-five pages and this page contain true and complete copies of all the orders and judgment and the opinion of said court of appeals in the case of City of Covington, appellant, against First National Bank of Covington, appellee, lately pending in said court, as the same appear of record in my office.

Witness my hand and seal this 31st day of July, 1900.

SAMUEL J. SHACKELFORD, *Clerk*,
By ROB'T L. GREENE, *D. C.*

Fee, $8.75.

87 And on the same day, to wit, on August 14, A. D. 1900, came the defendants, by their attorneys, and filed their joint and several plea herein. Said joint and several plea was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

The joint and several plea of The City of Covington and John N. Middendorf, assessor of said city, to the bill of complaint of the First National Bank of Covington, Kentucky.

These defendants (by protestation, not confessing any of the matters in said bill contained to be true in manner and form as the same are therein set forth, do plead thereunto and) for cause of plea say that heretofore, to wit, on the day said complainant exhibited its present bill of complaint in this honorable court and before and continuously since then it was and is a resident of the district of Kentucky, and that both defendants to said bill are and were residents of said district.

Wherefore defendants say this court has not jurisdiction of this cause of action nor them, the defendants.

F. J. HANLON,
HARVEY MYERS,
Solicitors for Defendants.

W. H. JULIAN, *Counsel.*

88 And on the same day, to wit, on August 14, A. D. 1900, came the defendants, by their counsel, and filed their joint and several demurrer herein. Said joint and several demurrer was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
CITY OF COVINGTON ET AL.

The joint and several demurrer of The City of Covington, Kentucky, and John N. Middendorf, assessor of said city, defendants, to the bill of complaint of the First National Bank of Covington, Ky.

These defendants say they are advised that there is good cause of demurrer to said bill, and they do demur accordingly, and for cause of demurrer say that said bill contains no matter of equity whereon this court can ground any decree or give complainant any relief as against these defendants. Wherefore these defendants do demur thereto and crave judgment of the court whether they shall make answer to said bill otherwise than as aforesaid, and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

W. H. JULIAN,
F. J. HANLON,
HARVEY MYERS,
Solicitors for Defendants.

89 I hereby certify, as counsel for defendants in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

F. J. HANLON.

The defendant John N. Middendorf makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

JOHN N. MIDDENDORF.

Subscribed and sworn to before me by said John N. Middendorf this 30th day of July, 1900.

J. M. MAHON,
Notary Public, Kenton County, Ky.

My commission expires March 4th, 1902.

And on the same day, to wit, on August 14, A. D. 1900, the court filed its written opinion referred to in the foregoing entry. Said opinion was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

FIRST NATIONAL BANK OF COVINGTON, KY., vs. CITY OF COVINGTON ET AL. } Opinion.

The complainant brings this action to enjoin the City of Covington and its officers from assessing and collecting for municipal
90 purposes the taxation on its shares of capital stock provided for in the act of the General Assembly of Kentucky, approved March 21, 1900, entited "An act relating to the taxation of shares of stocks of national banks," which is as follows:

"Whereas the Supreme Court of the United States has lately decided that article three chapter 103 of the Acts of 1891, 1892, 1893, is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in 1892, any adequate mode of taxing national banks, while State banks are now and have been ever since 1892, taxable for all purposes, State and local; therefore—

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

SECTION 2. For the purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

SECTION 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that where any national bank has heretofore for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

SEC. 4. All assessments of shares of stock contemplated by this

act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

SEC. 5. The assessment of said shares of stock and collection of taxes thereon, as contemplated by this act may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

91 SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court.

SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes an emergency exists, and this act shall take effect and be in force from and after its passage."

To clearly understand the scope of this very important controversy it is necessary to say that in 1886 in an effort to remedy the confusion growing out of certain unrepealable provisions in the charters of the older banks in regard to taxes, the legislature passed what is commonly called the Hewitt act, the pertinent provisions of which are as follows:

"SECTION 1. That shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed 75c. on each share thereof, equal to $100, or on each $100 of stock therein owned by individuals, corporations, or societies, and said banks, institutions and corporations shall in addition, pay upon each $100 of so much of their surplus, undivided surplus, undivided profits or undivided accumulations as exceeds an amount equal to 10 per cent. of their capital stock, which shall be in full of all tax, State, county and municipal.

* * * * * * *

SEC. 4. That each of said banks, institutions and corporations, by its corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the act of Congress, or under the charters of the State banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such banks."

This rate of taxation, all the avails of which went to the State, was higher than that paid by other property, but on that account the banks were exempt from local taxation.

92 In 1892 the legislature enacted what is now section 4077 of the Kentucky Statutes, as follows:

"SEC. 4077. Every railway company or corporation and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace car company, dining car company, sleeping car company, chair car company, and every other like company, corporation or association, and also every other corporation, company or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchises, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time as the business of the board may require."

Section 4078 prescribed the manner of ascertaining the value of the franchises to be assessed. As a basis for this assessment, banks, under section 4092, were required to make reports on the first day of March of each year of their condition the preceding 31st day of December, and to pay the tax on July 1st following. This subsequent legislation was intended to repeal, and in express terms did repeal, the Hewitt law. After the enactment of the legislation last referred to, the complainant, in November, 1893, instituted an action in the State court to enjoin the levy for that year as against it of the taxation thereby provided for, and in its petition averred that long before the enactment of this legislation it had accepted the provisions of the Hewitt act within
93 the time named therein; that it had up to that date paid the taxes provided for by the terms of the Hewitt act as accepted by complainant, and in due form sought the judgment of the State court upon its claim that the Hewitt act and its acceptances thereof constituted an irrevocable contract between the complainant and the State of Kentucky, which the legislation of 1892 would impair. The court in which the action was brought, in 1894, distinctly adjudged that this contention was well founded, and that the provisions of the Hewitt act and their acceptance by the complainant did constitute as irrevocable contract between the State and this bank, and, further, that the legislation of 1892 was void, as to the complainant, as impairing that contract. This decision of the court of appeals of Ken-

tucky affirming that judgment, being in favor of the right claimed under the Constitution of the United States, could not be appealed to the Supreme Court of the United States.

The bill of complaint, as amended, in the case before us insists, not only that the question of taxation between the complainant and the State of Kentucky, including the municipality of Covington up to 1904, is conclusively settled and adjudged by the court of appeals upon the basis referred to, but that the act of March 21, 1900, is also unconstitutional, first, in its attempt, by section 3, to authorize the levy of taxation upon the complainant for the years previous to March 21, 1900, and also, second, because the taxation provided for by the said act discriminates against national banks and levies upon the shares of national banks a greater rate of taxation than is
94 levied upon other moneyed capital, and particularly upon capital invested in State banks, and denies them the equal protection of the law.

As clearly established by many decisions, and particularly by that announced in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S., 664, all State laws providing for the taxation of shares of national banks must be subject to the provisions of section 5219 of the Revised Statutes of the United States, which is in this language:

"SECTION 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The Supreme Court, in the case last referred to, held that section 4077 of the Kentucky statutes, so far as it effects national banks, is void, because it is in conflict with that section.

The Hewitt law having been repealed in 1892 and section 4077 of the Kentucky statutes being void as to national banks, there was no State statute in force for taxing the shares of the latter for municipal purposes until the act of March 21, 1900, was passed. The third section of that act is now assailed upon the ground that it undertakes to tax those shares retroactively and illegally.

The court will not attempt to decide that there may not, in
95 extreme cases, be a legitimate statutory enactment imposing a retroactive taxation for previous years upon a class of property not then subject to taxation at all; but it would at least be a rare case, and one which would come extremely near to taking

property for public use without just compensation, and might be most dangerous and oppressive, as well as destructive of many other established principles of the law of taxation. If the power to do this exist at all, there is no limit to it, and it might illustrate the subject to consider the result if church property, now exempt, should, as it lawfully might, be made subject to taxation in the future, and not only so, but retroactively for ten, or twenty, or even fifty years back. Here would be a practical confiscation of such property for public use, nor does the court mean to deny that where the law, in fact, imposes taxation upon property, which, however, is overlooked by the assessor or otherwise omitted from the assessment or some other step is taken which is faulty, the defects may not be cured by legislation. That curative legislation is admissible in such cases is a well-established doctrine of the courts, but there was no legislation—valid legislation—for taxing national bank shares as such before March 21, 1900, and the act of that date was not passed to validate defective steps taken to levy a lawful tax, but it is legislation which imposes an altogether new tax upon a new subject. Any attempt to give it the appearance of being a curative statute is merely nominal and colorable and cannot be effective. The previous legislation had been void because it was opposed to section 5219, Revised Statutes, and could not be cured, though other new and different legislation might be enacted. Moreover, it imposes a tax upon national bank shares alone, and the retroactive feature
96 *feature* of section 3 is a manifest discrimination against national bank shares, as there is no corresponding provision in any law of the State for the retroactive taxation of moneyed capital in the hands of State banks or of individuals. Other banks paid and now pay only a franchise tax for municipal purposes. National banks must, according to the act, pay, not a tax equivalent to the franchise tax imposed upon State banks, but a tax the rate of which is the same as that upon "real estate," which rate might not comply with section 5219 of the Revised Statutes unless it is the same as that put upon other "moneyed capital," as that phrase has been construed by the Supreme Court. It is manifestly very improbable that the rate of taxation on real estate can be equivalent to the rate imposed by the franchise tax. At all events, for the reasons indicated, it seems to the court to be very clear that section 3 of the act conflicts with the requirements of section 5219, because there is nowhere any corresponding retroactive imposition on State bank shares, and the rate of taxation on real estate can hardly be the equivalent of the rate of taxation imposed on State banks by the franchise tax, and, besides, as the bill shows, the State has collected and received from the complainant in this case the high taxes imposed under the Hewitt law up to the current year. There is no way to sue the State of Kentucky in her courts to compel it to refund the tax thus paid; nor is there any way to compel the State to make an adjustment of such payments in the collection of the taxes under section 3 of the act of 1900, although it is therein vaguely provided that credit shall be given; but

our laws afford no way authoritatively to make the provision
97 effective. No officer is charged with the duty or given the power to make it so. Until the State in this case has refunded the taxes wrongfully collected (if it should so turn out) under the Hewitt act, or shall provide some adequate way for doing so, it must be content with the taxation levied in the way provided by its own legislation, at least so long as it retains the money; otherwise there would be a double taxation. Certainly the State must not, in attempts to correct its legislation upon the subject of taxation, discriminate against national bank shares in such a way as to violate section 5219. So long as the State retains the taxes collected under the Hewitt law from this national bank, it is a manifest discrimination against it to again retroactively tax its shares for the same years without taxing also in the same way the State banks. We may sum up this phase of the case by saying that it may, in the abstract, be legally possible to pass a valid retroactive tax law, yet in the concrete case before us it was not done, the attempted legislation, for the reasons indicated, being in conflict with section 5219.

As the present holders of the complainant's shares may be very different persons from those who held them in previous years, as the present holders may have purchased under the previously existing law, and as their rights and interests would be injuriously affected by large payments for retroactive taxation, at least one phase of what has been said is well supported by the reasoning of the opinion of the court of appeals in Bellevue *vs.* Peacock, 89 Ky., 495. When the town of Bellevue made a contract with certain persons to improve a street it was supposed by all parties that the law empowered the town to impose the cost upon the abutting prop-
98 erty, and the contract so required. The court of appeals, however, decided that the town had no such power. Subsequently the legislature passed an act attempting to validate the contract and to impose the necessary taxation retrospectively upon the property. In a suit to test that question the court, in the opinion referred to, held the act unconstitutional, largely upon the ground that as there was no law to so burden the property at the time the improvements were made, the legislature could not subsequently impose it. The complainant and its shareholders in the case before us stand in substantially the same position as did the owners of the abutting property in the Bellevue case, in respect to previous judicial decisions and otherwise. There was no law until the act of 1900 imposing any such liability as it attempted to create, and at least, unless a similar burden is imposed upon other moneyed capital, the retroactive liability cannot be imposed upon national banks.

Coming now to the question of whether the whole act of March, 1900, is void as being in conflict with section 5219 of the Revised Statutes, it must be borne in mind that this may be manifested in either of two forms: First, it may appear on the face of the State law itself, as in the statute of 1892, pronounced invalid by the Supreme Court in the case of Owensboro National Bank *vs.* Owensboro, 173 U. S., or, second, it may come in the manner of enforcing the State law or in the manner of operating under it, as in cases like People *vs.*

Weaver, 100 U. S., 539, and Whitbeck *vs.* Mercantile National Bank, 127 U. S., 193.

99 It goes without saying that money invested in national bank shares should bear its ratable proportion of the public burdens. Nothing in the legislation of Congress nor in the decisions of the courts of the United States in the slightest degree prevents this. All that is done is, under section 5219, to guard money so invested against any form of State taxation which puts it at a disadvantage as compared with money invested in State banks. The wisdom and necessity of this rule is obvious. The professed object of the act of 1900 is to make the taxation upon all banks equal. The operations of the act may possibly in the future bring about such a result, though upon the face of the statute it appears well nigh impossible. *Prima facie* discrimination exists, the one being taxed on an entirely different basis or plan from the other. The State banks pay taxes upon a valuation of their franchise, &c., and national banks upon the valuation of their shares in the hands of individual holders. By no intelligent system of valuation does it appear possible to value a franchise annually as high as all the property of the corporation, as appears to be necessary in order to make the two modes of taxation agree. These cannot be equivalent in law, and *prima facie* they appear not to be equivalent in fact, though possibly this latter appearance may be overcome by proof. The City of Covington would therefore appear to be entitled to have an opportunity, if so desiring, to plead and prove that the result of the operations of the act of 1900 will not in fact discriminate in the next fiscal year against money invested in national bank shares, and after this opportunity is afforded the court can determine upon the evidence whether the actual results under the act conflict with section 5219 by imposing a greater rate of taxation upon money

100 invested in national bank shares than upon that invested in State bank shares, should there be any moneyed capital in said city so invested as to bring it within the rules adopted by the Supreme Court in construing section 5219.

In this particular case, however, the views so far expressed may all become subordinate to the question most energetically urged, that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the State to the effect that its shares shall only be taxed according to the provisions of the Hewitt law, and that this matter has been finally adjudicated by the courts of the State in the manner stated in the bill.

The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties or those in privity with them is certainly broad enough, as usually stated, to cover cases like this if there are no exceptions to it. The case of New Orleans *vs.* Citizens' Bank, 167 U. S., 371, goes far towards closing the question, and will do so unless its operation should be limited by considerations now to be stated. Of course, as to the claim for taxes for the year named in the suit described in the bill of complaint, the judgment is absolutely conclusive, although in the light of later decisions

palpably erroneous. Should its effect be limited to the taxes for the year named in that suit, under the circumstances about to be stated, is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law and the complainant's acceptance of its provisions constituted an
101 irrevocable agreement between the bank and the State of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893 and only enjoined their collection. It did not in its language or scope embrace any others. It, however, as stated, went upon the general doctrine that there was a contract thus created between those parties which the Federal Constitution protected from any impairment. Bank Tax cases, 97 Ky., 591. Within a year or so after this judgment was rendered, and from which no appeal could be taken to the Supreme Court of the United States for the reason already indicated, the court of appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation. 39 S. W. Rep., 1030. It was then also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the State and might be altered at its pleasure. In the case of the Citizens' Savings Bank, &c., *vs.* Owensboro, 173 U. S., 636, the Supreme Court sustained in the fullest manner the last view taken of the question by the court of appeals of Kentucky, so that we have here a claim to the benefit of the doctrine of *res adjudicata* as against the clearest decision that the judgment relied on was based upon a proposition, not of fact, but of constitutional law, which has been utterly repudiated, not only by the highest judicial tribunal in Kentucky which announced it, but also by the Supreme Court of the United States itself. I have not found any decision upon the exact point, but I am greatly
102 oppressed by the thought that common justice may demand such a relaxation of the general rule as to matters adjudicated as to limit its operation within very wide bounds, it is true, but still to such as will exclude a case precisely like this, so far at least as it affects taxation subsequent to the announcement of the final settlement of the constitutional doctrine; otherwise much injustice and inequality cannot be avoided. It is impossible that it was with a purpose and desire to consider this phase of the question when it should come up that the Supreme Court, in the Owensboro case, 173 U. S., at page 648, so explicitly withheld an expression of its opinion as to whether the principle of *res adjudicata* would apply to suits for taxes claimed for future years in a case where there had been such a judgment as is here pleaded.

It may be that the authorities, which are very strong, will not permit even such an exception to be grafted upon the general rule, and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of New Orleans *vs.* Citizens' Bank, 167 U. S., for this court to leave it to a higher tribunal to say whether there should be any limitations upon

the general rule as to the conclusive effect of judgments as between the parties to the litigation; but, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration.

It has been suggested that, before any injunction is granted, the complainant in such a case should pay the amount of
103 taxes which is fairly due from it. This is a principle certainly in force where a valid law leaves no doubt that something is due, but if the claim of *res adjudicata* made by the complainant is maintained, such payment in this case has already been made, and even if the principle could apply here at all, where the entire tax is contested, it can hardly be enforced until a final judgment has determined whether there is anything at all due from the complainant, and, besides, there appears to be manifest equity in the bill, so far as it seeks to enjoin the enforcement of section 3 of the act.

It is also insisted that for the case made by the bill there is an adequate remedy at law. The case of The Bank of Kentucky *vs.* Stone, 88 Fed. Rep., 383, is a sufficient authority to the contrary, although that case was affirmed by a divided court (174 U. S., 799), and, besides, the relief sought as to section 3 of the act appears to be decisive of this question. It also seems to be settled, upon the authority of Hills *vs.* Exchange Bank, 105 U. S., 319, and the cases there cited, that the bank itself may sue in cases like this to protect the interest of its shareholders.

It follows that the complainant is entitled to an injunction *pendente lite* restraining the defendants and each of them, until the further order of the court, from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and also until the further order of the court restraining the defendants and each of them from collecting, either from the complainant or from any
of the holders of shares of its capital stock, any taxes
104 upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a rate higher than is permitted by section 5219, Revised Statutes, and, if so, to what extent.

Counsel will prepare the proper orders.

WALTER EVANS, *Judge.*

August 14, 1900.

And on the same day, to wit, on August 14, A. D. 1900, the following temporary injunction issued herein in words and figures following, to wit:

United States Circuit Court, District of Kentucky, at Covington, May Term.

TUESDAY, *August 14th, A. D.* 1900.

Court met.

Present: Hon. Walter Evans, judge.

FIRST NATIONAL BANK
vs.
CITY OF COVINGTON ET AL.

This day came complainant, by J. W. Bryan, its counsel, and, with leave of the court, filed its amended bill of complaint
105 herein, with an exhibit therewith attached, and moved the court for a temporary injunction restraining the defendants from assessing or collecting any taxes for municipal purposes from complainant or any of its shareholders until the further order of the court. Pending said motion the defendants came by F. J. Hanlon, W. J. Julian, and Harvey Myers, their counsel, and, with leave of the court, tendered and filed a plea to the jurisdiction of the court of this action, and, with like leave of the court, were also permitted now to file a demurrer to the bill of complaint as amended, but neither said plea nor said demurrer was set down for argument, and the said motion of the complainant for the temporary injunction aforesaid, coming on to be heard, was argued by counsel, and the court, being sufficiently advised, delivered an opinion in writing, which is ordered to be filed, and pursuant thereto it is ordered, adjudged, and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed
106 are at a higher rate than is permitted by law and to what extent. Service of this order shall be made upon the defendants by delivery to each of them of a copy thereof.

UNITED STATES OF AMERICA, }
District of Kentucky, } *ss:*

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an entry made in the matter set out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand, as clerk, and the seal of said court, at Covington, this 14th day of August, A. D. 1900, and of our Independence the 125th year.

JOS. C. FINNELL, *Clerk.*

And afterwards, to wit, on August 17th, A. D. 1900, the above temporary injunction was returned and filed, bearing the following endorsement, by the marshal, to wit:

"I hereby certify that I received the within writ on the 15th day of August, 1900, and that I personally served the same this 15th day of August, 1900, upon the said defendant, The City of Covington, by delivering to W. A. Johnson, its mayor, a true copy of this writ, and John N. Middendorf, assessor for the city of Covington, by delivering to him a true copy of the within writ. This, therefore, returned executed, as the law directs, this 15th day of August, 1900.

A. D. JAMES, *U. S. M.*,
By J. D. COMPTON, *Deputy.*

Fee, $4.00."

107 And on a day following, to wit, on December 17th, A. D. 1900, came the complainant, by its counsel, and filed motion to make permanent the *pendente lite* injunction. Said motion was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky.

THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON, KENTUCKY, ET AL.

The complainant, The First National Bank of Covington, Ky., by J. W. Bryan, its counsel, moves that the injunction granted *pendente lite* herein be made permanent.

FIRST NATIONAL BANK OF COVINGTON, KY.,
By J. W. BRYAN, *Its Counsel.*

And on the same day, to wit, on December 17th, A. D. 1900, the following stipulation was filed herein, viz:

United States Circuit Court, District of Kentucky, at Covington.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL. } Stipulation.

It is hereby stipulated and agreed by and between the parties to this cause that they do now waive alike the setting down for argument of the defendants' plea to the jurisdiction of the court
108 and of their demurrer to the bill of complaint. It is also stipulated and agreed that if the court shall not sustain the

said plea, and if it shall disallow and overrule the said demurrer, then, that in that event, the bill shall be taken for confessed, the defendants now saying that they do not desire to answer the said bill or further plead thereto, and that, without waiting the thirty days required by the rules after a judgment *pro confesso*, the cause may be submitted for final judgment and the matter thereof and all pending motions be adjudged by the court.

THE FIRST NATIONAL BANK
OF COVINGTON, KY,
By J. W. BRYAN, *Its Counsel*,
F. J. HANLON,
Solicitor for Defendant City of Covington,
HARVEY MYERS,
Counsel for Def't.

And on the same day, to wit, on December 17th, A. D. 1900, an entry was made on the journal of said court clothed in words and figures following, to wit:

Journal "I," page 45.

The parties came, by their counsel, and the complainant, in writing now filed, moved the court "that the injunction granted *pendente lite* herein be made permanent," and thereupon the parties filed a stipulation in writing, and pursuant thereto this cause is now submitted for the judgment of the court upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint, and if the said plea and said demurrer are both disallowed and overruled, then the cause is submitted for the judgment of the court as upon a
109 final hearing, the bill, by said agreement, being then to be taken for confessed and further delay thereon being waived by the consent of the parties.

And on the same day, to wit, on December 17th, A. D. 1900, an entry was made upon the journal of said court clothed in words and figures following, to wit:

Journal "I," page 45.

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged, and decreed as follows, namely:

First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

Second. That the bill of complaint, as amended and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appear-

ing to the court, it is further ordered, adjudged, and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants,
110 until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendant elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged, and decreed that the complainant recover of the defendants its costs herein expended, to be taxed by the clerk.

The complainant and the defendants alike, separately and each for himself, excepts to the foregoing judgment.

Afterwards, to wit, on December 19th, A. D. 1900, the following restraining order issued herein in words and figures as follows, to wit:

111 United States Circuit Court, District of Kentucky, at Covington, December Term.

MONDAY, *December 17th, A. D.* 1900.

Court met.

Present: Hon. Walter Evans, judge.

FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON ET AL.

This cause came on to be further heard at this term, and was argued by counsel, and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged, and decreed as follows, namely:

First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

Second. That the bill of complaint is sufficient and contains mat-

ters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged, and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from
112 any of the holders of the shares of its capital stock, any taxes upon any of said shares upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant.

Fifth. It is further ordered, adjudged, and decreed that the complainant recover of the defendants its costs herein expended, to be taxed by the clerk.

The complainant and the defendants alike, separately and each for himself, excepts to the foregoing judgment.

UNITED STATES OF AMERICA, }
District of Kentucky, } ss:

I, Jos. C. Finnell, clerk of the United States circuit court for the sixth judicial circuit and district of Kentucky, at Covington, do hereby certify that the foregoing is a true and correct copy of an order made and entered in the matter set out in the caption
113 hereto, as the same appears from the records and files of this office.

Witness my hand, as clerk, and the seal of said court, at Covington, this 19th day of December, A. D. 1900.

JOS. C. FINNELL, *Clerk.*

And on the day following, to wit, on December 20th, A. D. 1900, the restraining order was returned and filed, bearing the following endorsement by the marshal, to wit:

"I hereby certify that I received this writ on the 20th day of December, 1900, and that I personally executed it by delivering a true copy of the within order to W. A. Johnson, mayor of the city of Covington, defendant; also to W. A. Johnson, individual-, on the 20th day of December, 1900, in Covington, Ky.

A. D. JAMES,
U. S. Marshal,
By J. D. COMPTON, *Deputy.*

Fee, $4.00."

And afterwards, to wit, on January 7th, A. D. 1901, an entry was made upon the journal of said court clothed in words and figures following, to wit :

Journal "I," page 61.

The defendants, The City of Covington and John N. Middendorf, the assessor of the city of Covington, considering themselves
114 aggrieved by the judgment herein on the 17th day of December, 1900, come now and present to the court their petition for an appeal to the Supreme Court of the United States, together with an assignment of errors, asserted and intended to be urged in that behalf.

On consideration whereof the court now orders that on a bond, as provided by law, being filed, in the penal sum of $500.00, to the acceptance of the clerk, the said appeal be allowed, and it is ordered that a transcript of the record, proceedings, and papers upon which the judgment of this court was rendered in this cause, duly authenticated, be sent to the Supreme Court of the United States, according to law in such case provided.

Said petition for appeal referred to in the foregoing entry was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky, at Covington, December Term.

MONDAY, *December 17th*, 1900.

FIRST NATIONAL BANK
vs.
THE CITY OF COVINGTON ET AL.

Before the Honorable Walter Evans, judge.

To the Honorable Walter Evans:

The above-named defendant-, City of Covington and John N. Middendorf, the assessor of the city of Covington, conceiving themselves aggrieved by the order and decree made and entered
115 in the above-entitled cause on December 17th, 1900, wherein and whereby it was ordered, adjudged, and decreed "that the said defendants and each of them be enjoined and restrained from assessing for taxation any of the shares of stock in the complainant bank, either against complainant or any holder of its shares,

or making any levy of taxes upon any of said shares for any purpose for any time or period previous to March 21, 1900, and from collecting from complainant or any of its shareholders any taxes upon any of said shares of stock for any time subsequent to that date," said decree being final; to which decree the said defendants and complainant and each of them excepted at the time of the rendition thereof. The said defendant-, City of Covington, by their attorney, now come and do hereby appeal from said order and decree of December 17, 1900, to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herein, and they and each of said defendants pray that this appeal may be allowed, and they pray for an order fixing the amounts of the supercedeas bond which defendant- shall give and furnish upon said appeal, and that a transcript of the record, papers, and proceedings upon which said order and decree was made, duly authenticated, may be sent to the Supreme Court of the United States, to the end that said decree may be reversed and that said errors may be corrected; and so they will ever pray.

F. J. HANLON,
City Solicitor, for City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

116 And on the same day, to wit, on January 7th, A. D. 1901, said assignment of errors referred to in the foregoing petition for appeal was filed herein. Said assignment of errors was and is in words and figures following, to wit:

United States Circuit Court, District of Kentucky, at Covington, December Term.

MONDAY, *December 17th*, 1900.

FIRST NATIONAL BANK
vs.
THE CITY OF COVINGTON ET AL. } Assignment of Errors.

Before the Hon. Walter Evans, judge.

To the honorable Judge Evans:

Comes now the defendants and each of them and file the following assignment of errors, upon which they and each of them will rely:

First. The court erred in overruling the defendants' plea to the jurisdiction of the court.

Second. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient, and in overruling the demurrer of the defendants thereto.

Third. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and

from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes, either from the complainant bank or from any of the holders of the shares of the capital stock of
117 said bank, for any time subsequent to that date.

Fourth. The court erred in retaining control of this cause for any purpose.

Fifth. The court erred in decreeing costs herein against defendant.

Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint.

In order that the foregoing assignment of errors may be and appear of record, the respondents and each of them present the same to the court and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided.

All of which is respectfully submitted.

F. J. HANLON,
City Solicitor, for the City of Covington.

HARVEY MYERS,
W. H. JULIAN,
Of Counsel.

And on a day following, to wit, on January 18, A. D. 1901, a bond was filed in the clerk's office of said court, which was and is in words and figures following, to wit:

Circuit Court of the United States, District of Kentucky.

118 THE FIRST NATIONAL BANK OF COVINGTON, KY.,
vs.
THE CITY OF COVINGTON and JOHN N. MIDDENDORF, Assessor of the City of Covington.

Know all men by these presents that we, The City of Covington and The American Bonding and Trust Company of Baltimore City, are held and firmly bound unto The First National Bank of the City of Covington in the sum of five hundred dollars, to be paid to the said The First National Bank of the City of Covington, Kentucky, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of January, A. D. 1901.

Whereas the above-named The City of Covington, Ky., and John N. Middendorf, assessor of said city of Covington, Ky., have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the District of Kentucky, at Covington:

Now, therefore, the condition of this obligation is such that if the above-named The City of Covington, Ky., and John N. Middendorf, assessor of the said city of Covington, Ky., shall prosecute this said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

119 THE AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY,
By BEN. A. ADAMS, *Vice-Pres't.*

[SEAL.]

Attest: L. J. DROEGE, *Ass't Sec'y.*

THE CITY OF COVINGTON,
By W. A. JOHNSON, *Mayor.*

Sealed and delivered in the presence of—
JOS. C. FINNELL, *Clerk.*

Approved January 18, A. D. 1901.

JOS. C. FINNELL,
Clerk U. S. Circuit Court, Ky. Dist.

UNITED STATES OF AMERICA, *District of Kentucky,* } ss:

I, Jos. C. Finnell, clerk of the circuit court of the United States for the sixth judicial circuit and district of Kentucky (at Covington), do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the cause set out in the caption hereto, as the same appears of record and on file in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Covington, Kentucky, this 15th day of February, A. D. 1901.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL,
Clerk U. S. Cir. Court, Ky. Dist., at Covington.

Endorsed on cover: File No., 18,056. Kentucky C. C. U. S. Term No., 255. The City of Covington, Kentucky, and John N. Middendorf, assessor of the city of Covington, appellants, *vs.* The First National Bank of Covington, Kentucky. Filed February 20, 1901.

The Rotary Chester Gregory, Printers. [October, 1901.

Office Supreme Court
FILED
OCT 15 1901
JAMES H. McKENNEY,
Clerk

(12,058.)

Supreme Court of the United States.

OCTOBER TERM, 1901.

The City of Covington, Ky., et al.,
Appellants,

No. 255.] *vs.*

The First National Bank of Covington, Ky.,
Appellee.

Appeal from the Circuit Court of the United States from the District of Kentucky.

MOTION TO ADVANCE.

F. J. HANLON, *City Solicitor,*
HARVEY MYERS,
W. H. JULIAN,
Solicitors for Appellants.

JAMES W. BRYAN,
Solicitor for Appellee.

(18,056.)

Supreme Court of the United States.

OCTOBER TERM, 1901.

The City of Covington, Ky., et al.,
Appellants,

No. 255.] *vs.*

The First National Bank of Covington, Ky.,
Appellee.

Appeal from the Circuit Court of the United States from the District of Kentucky.

MOTION TO ADVANCE.

The appellants, City of Covington, *et al.*, and also the appellee, The First National Bank of Covington, Kentucky, now come and move the Court, that the above styled cause be advanced for hearing at as early a date as may be convenient and proper under the rules of Court.

The matter involved in the said case is the City *ad valorem* taxes for the years 1893 to 1904, inclusive. The right of the City to collect said taxes is claimed by the City under and by virtue of its charter (charter of cities of the second class in Kentucky) and a certain Act of the Kentucky Legislature approved on March 21, 1900, which Act is as follows:

An Act relating to the taxation of the shares of stock of national banks.

WHEREAS, The Supreme Court of the United States has lately decided that article three (3) chapter one hundred and three (103) of the acts of eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore:

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Taxing shares of national bank stock.

SECTION 1. "That the shares of stock in each national bank in this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

Manner of listing.

SEC. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

When shares have not been listed since revenue law of 1892.

SEC. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for

Where franchise tax has been paid.

taxation under said levy or levies; *Provided*, That where any national bank has heretofore, for any year or years paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years. *And provided further*, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

Where paid under Hewitt bill.

A[illegible]ments entered and reported as real estate is entered and reported.

SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

Assessments; how enforced.

SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

Purpose of Act.

SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

Emergency clause.

SEC. 7. WHEREAS, It is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage."

Approved March 21, 1900.

Payment of said taxes is resisted by the appellee, Bank, upon five grounds:

First: That under a contract between it and the Commonwealth of Kentucky, it, the appellee Bank, and its shares of stock, are exempt from taxation by appellant, City, until 17th November, 1904.

Second: That by reason of a judgment of the Campbell Circuit Court (Kentucky), and one by the Court of Appeals of Kentucky in 1894 and 1895, respectively, in a suit between appellant, City of Covington, and appellee, Bank, the appellant City is estopped to deny the existence of such contract so exempting appellee Bank and its shares of stock.

Third: That appellee Bank, and its shares of stock, are exempt from taxation by appellant City, until 17th November, 1904, is *res judicata*.

Fourth: That said Act of 21st March, 1900, is as to appellee, invalid, illegal and void, an impairment of the obligations of its said contract with the State of Kentucky, and taking of the private property of the Bank and its shareholders for public use, without due process of law, and without just compensation, and an abridgment of its privileges and immunities, and a denial to it of the equal protection of the laws, and in violation of Sec. 10, Article I, and of Articles V and XIV of the Amendments to the Constitution of the United States.

Fifth: That said Act is in conflict with and repugnant to the provisions of Sec. 5219 of the Revised Statutes of the United States.

The reason for this application is that the matters involved herein are of great public interest and concern to the public and taxpayers of Kentucky. Both parties hereto are desirous that the law as to taxation of this

National Bank be speedily settled, and pray this Honorable Court that this case be advanced and heard at as early a date as may be convenient and proper, under the rules of Court.

F. J. HANLON, *City Solicitor*,
HARVEY MYERS,
W. H. JULIAN,
Solicitors for Appellants.

JAMES W. BRYAN,
Solicitor for Appellee.

Filed Oct. 15, 1901.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 255.

CITY OF COVINGTON, ET AL., APPELLANTS,

vs.

FIRST NATIONAL BANK OF COVINGTON, KY., APPELLEE.

BRIEF FOR APPELLANTS.

P. J. HANLON, City Solicitor,
HARVEY MYERS
W. H. JULIAN,
Attorneys for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 225.

THE CITY OF COVINGTON, ET AL., APPELLANTS,

vs.

THE FIRST NATIONAL BANK OF COVINGTON, KENTUCKY, APPELLEE.

BRIEF FOR APPELLANTS.

STATEMENT OF CASE.

There are two questions involved in the merits of this case—1st, that as to the constitutionality of a certain act of the Kentucky Legislature, approved March 21, 1900, and entitled "An act relating to the taxation of the shares of stock in national banks." 2nd, that as to a certain plea of estoppel by *res judicata*.

Said questions arose and are now presented to this Court as follows:

In 1892, the Kentucky Legislature adopted an act, entitled "An act relating to revenue and taxation," article three (3) of which related to the assessment and taxation of corporate franchises. (See Acts 1891–'92–'93, page 277, which is incorporated in Kentucky Statutes as chapter 108.)

This said act of 1892, by its express terms, applies to both State and national banks.

In 1899, in Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., this Court held that said article three (3), relating to the taxation of corporate franchises, was void in so far as it proposed the taxation of the franchises of national banks.

At the next succeeding Legislature thereafter, on March 21, 1900, the Kentucky Legislature, in view of said decision by this court, adopted the act now in controversy.

For convenience of the Court, we insert in this brief a copy of said entire act, which is as follows:

CHAPTER 23.

AN ACT relating to the taxation of the shares of stock of national banks.

Whereas, The Supreme Court of the United States has lately decided that article three (3), chapter one hundred and three (103) of the acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore,

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Taxing shares of national bank stock.

§ 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

Manner of listing.

§ 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

When shares have not been listed since revenue law of 1892.

§ 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; Provided, That where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three (3) of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of

Where franchise tax has been paid.

this section as to said year or years. And provided further, That where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

Where paid under Hewitt bill.

§ 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

Assessments entered and reported as real estate is entered and reported

§ 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessments of real estate and collection of taxes thereon may be enforced.

Assessments: how enforced.

§ 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three (3) of the revenue law and said decision of the Supreme Court.

Purpose of act.

§ 7. Whereas, It is important that State banks and national banks should be taxed equally for all purposes, an emergency exists, and this act shall take effect and be in force from and after its passage.

Emergency clause.

Approved March 21, 1900.

On July 23, 1900 (four months after the adoption of said act), this suit was instituted by the First National Bank of Covington in the United States Circuit Court for the District of Kentucky, asking an injunction against the city of Covington and city officers' proceeding to collect city taxes under said act.

The grounds relied on by complainant Bank were and are: 1st, that the said act of March 21, 1900, is unconstitutional and void; 2nd, that in 1895, in a suit to which said bank and city were parties, the Court of Appeals of Kentucky adjudged that what is known as the Hewitt Bill constituted an irrevocable contract between said bank and the State, by which judgment said city and officers are now estopped from proceeding to collect city taxes under the said act.

The case having been heard, the court below (Hon. Walter Evans being judge thereof), granted and perpetuated the injunction prayed for as to taxes for any time prior to March 21, 1900, (date of adoption of said act), but refused the injunction as to taxes for any time subsequent to said date. The judgment of the court below, therefore, in effect, overruled the plea of estoppel by reason of the said adjudication in 1895, and sustained the said act of March 21, 1900, except as to the retrospective feature thereof. To that judgment the appellants excepted and prayed an appeal to this court.

SPECIFICATION OF ERRORS.

1st. The court erred in overruling defendants' plea to the jurisdiction of the court.

2nd. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient, and in overruling the demurrer thereto.

3rd. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes, either from the complainant bank or from any of the holders of shares of stock therein for any time subsequent to that date.

4th. The court erred in retaining control of this cause for any purpose.

5th. The court erred in decreeing costs herein against defendant.

6th. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint.

BRIEF OF ARGUMENT.

I.

Retroactive Legislation.

Is the Act in controversy unconstitutional by reason of the retrospective feature thereof?

In view of Mercantile National Bank vs. New York, 121 U. S., and other cases of like import, the Legislature of 1892 thought that national banks could be lawfully taxed as provided in article 3, chapter 108, Kentucky Statutes. The Legislature continued

under that impression until decision by Supreme Court in 1899. (Owensboro National Bank vs. City of Owensboro, 173 U. S.)

The Legislature of 1900, having discovered its error in that regard, undertook to conform the Revenue Laws of the State to said decision, and also to prevent, as far as practicable, any unjust or injurious consequences from said misunderstanding on part of the Legislature. To that end, the act in controversy was adopted; which has (substantially) the same effect that an act adopted in 1892 subjecting national bank shares would have had. In other words, the Legislature of 1900 did substantially what it could have done and should have done by legislative enactment in 1892.

The *ad valorem* levies, State and local, were imposed each year since 1892. Same have been paid by State banks and other taxpayers generally. National banks and the shareholders therein have received their share of the benefits of said levies.

The retroactive feature of said act is not inhibited by either the State or Federal Constitution. It does not impair the obligation of any contract. It does not take private property for public use without just compensation previously rendered. It only requires the owners of national bank shares to pay a just compensation for the benefits they have received under and in consequence of said *ad valorem* levies. It only provides a remedy for correction of a wrong and enforcement of a right. When the *ad valorem* levies of each year were imposed, the right of the State and localities to taxes thereunder upon national bank shares arose. As lately declared by Kentucky Court of Appeals: "When the tax levy is made, the liability (for taxes) accrues. For such liability a lien existed on his property." (Board of Councilmen vs. Mason & Foard Co., 100 Ky., 48; Blackwell on Tax Titles, 5th Ed. (1889), sections 324 and 327; Ky. Statutes, sections 3176 and 3375.)

The Hewitt Law having been repealed prior to 1893, and the Revenue Act of 1892 being void, in so far as it proposed taxation of the franchises and property of national banks, the shares in national banks were left, in 1893, subject to taxation for State and local purposes, under the Constitution and revenue laws of Kentucky, precisely as if neither said Hewitt Law nor Act of 1892 had ever been enacted. (Constitution Kentucky, sections 170, 171, 172 and 174; Kentucky Statutes, sections 4020, 4022, and the charters of first, second, third, fourth, fifth and sixth class cities, incorporated in Kentucky Statutes; Scobee, Sheriff, vs. Beam, &c., 22 Ky. Law Rep., 1076.)

Section 5219, Revised Statutes U. S., requires that national bank shares belonging to non-residents of the State shall be taxed where the bank is located, and not elsewhere. As to shares belonging to persons who reside within the city or town where bank is located, of course the *situs* for taxation thereof is "where the bank is located." The shares in all State banks and other institutions of loan or discount, and in all corporations embraced by article 3, chapter 108, Kentucky Statutes, are indirectly taxed where the corporation is located, the taxation being (nominally) upon the property and franchise of the corporation. National bank shares are only an interest in the property and business operations of such banks, and ought to be taxed where the corporate property and business are situated and conducted; that is, where the bank is located, and not elsewhere.

Section 171, Kentucky Constitution, provides: "They (taxes) shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." These constitutional and statutory provisions fix the *situs* of all national bank shares for purposes of taxation "where the bank is located, and not elsewhere." Otherwise, taxation of same could not he uniform nor equal. The Constitution of Kentucky does not contemplate that some of the shares in a national bank may be taxed where the bank is located, and other shares in the same bank taxed elsewhere. Such would conflict with the principle of uniformity and equality in taxation expressly incorporated in the present Constitution of Kentucky. (Maltby vs. R. & Col. Ry. Co., 52 Pa. St., 140, and authorities there cited.)

In some States the corporate property of corporations, and also the shares of stock therein, may be taxed, the shares of stock being considered as, in themselves, a property distinct from the corporate property. Where that is the rule, the common law *situs* for taxation of the shares of stock is where the owners thereof reside. That, however, is not the rule in Kentucky. In this State, if the shares of stock be taxed, the corporate property is exempted, and *vice versa*, one being considered as a representative of the other. Where this is the rule, the common law *situs* for taxation of the shares of stock is where the corporation is located and its business conducted.

Besides, no legislative purpose could be made more manifest than that of the Kentucky Legislature in adopting the revenue system of 1892, that the *situs* for taxation of corporate property and the shares therein, should be at the domicile of the corporation. The mere fact that the taxation was nominally upon the

corporate property and franchises does not affect said legislative purpose. The burden of taxation was, none the less, really upon the shareholders, wherever they might reside. This purpose, as to *situs*, applied no less to national bank shares than to shares or interests in other corporations. The underlying principle was, that the burden of taxation should be imposed where the corporation was located. The Supreme Court, in Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., did not hold said Revenue Act of 1892, void, in so far as it fixed the *situs* for taxation, but only in so far as it required the taxation of the corporate property and franchises of national banks. With respect to the proper *situs* for taxation, said Revenue Act of 1892 is unaffected by said decision, and is now in force as to national banks and all other corporations.

Hence, independently of the Act of 1900 in controversy, national bank shares were subject to taxation in 1893 and each year since then, both for State and local purposes, "where the bank was located and not elsewhere." If there were a doubt or question as to the place at which certain of said shares should be assessed, such doubt or question were only an additional reason for adoption of the Act in controversy. (Marion County vs. L. & N. R. R. Co., 91 Ky., 388.)

The Act of 1900, in obedience to Supreme Court mandate, simply transfers the burden of taxation from the corporate property and franchises to the shares of stock, leaving the *situs* for taxation as fixed by section 5219, Revised Statutes U. S., and Revenue Laws of Kentucky—that is, "at the place where the bank is located and not elsewhere."

In so far as said Act of 1900 relates to the subjection of national bank shares to taxation, or to the *situs* for taxation, it is only declaratory of the pre-existing law. Requirement that the bank shall list the shares and pay taxes, relates only to the "mode of collection," and "is only a reasonable requirement." (First National Bank vs. Commonwealth, 9 Wallace, 353.)

The subject of retroactive legislation is very ably discussed and correctly adjudicated in the case of Butler vs. The City of Toledo, 5 Ohio St., 225. An excellent collation of authorities on the subject will be found in the report of said case. The controlling principle on the subject, as declared in said Ohio case and also in Cooley & Desty on Taxation, is: "Retrospective laws, which violate no principle of natural justice, but are in furtherance of equity and good morals, are not forbidden by the Consti-

tution." See also, Marion County vs. L. & N. R. R. Co., 91 Ky., 388, and authorities therein cited.

In Kentucky, statutory provision is made for the retrospective assessment of all property. (Kentucky Statutes, sections 4090 and 4241; Louisville and Jeffersonville Ferry Company vs. Commonwealth, 22 Ky. L. Rep., 446.)

II.

Discrimination.

Is the Act in controversy unconstitutional by reason of conflict with section 5219, Revised Statutes U. S.?

The *ad valorem* levies, State and local, imposed upon the shares of stock in national banks by the act in controversy (in connection with other laws of Kentucky) are the same as the *ad valorem* levies, State and local, imposed by the laws of Kentucky upon "other monied capital in the hands of individual citizens." (2) No part of the "monied capital in the hands of individual citizens," in Kentucky, is exempted from taxation, either State or local. The same amount of taxes, State and local, required by the act in controversy to be collected upon each $100.00 in value of the shares of stock in national banks is required by the laws of Kentucky to be collected upon each $100.00 in value of all the "monied capital in the hands of individual citizens" in Kentucky. (3) The act in controversy requires the shares of stock in national banks to be assessed for taxation in the same manner that all "monied capital in the hands of individual citizens," in Kentucky, is required to be assessed for taxation, except such monied capital in the hands of individuals as is invested in State banks and other institutions of loan or discount, which is assessed as provided in article 3, chapter 108, Kentucky Statutes. (4) No assessing officer of Kentucky has assessed, or proposes to assess, for taxation, any share of national bank stock unfairly or in any manner otherwise than as required by the laws of Kentucky, and section 5219, Revised Statutes U. S. (Constitution Kentucky, sections 170, 171, 172 and 174; Kentucky Statutes, sections 4020, 4022 and article 3, chapter 108.) Neither of the said four propositions will be controverted. Therefore, the defendants contend and believe that the "taxation" of shares in national banks, required by the act in controversy, or proposed by any assessing officer, is not "at a greater rate than is assessed upon other monied capital in the hands of individual citizens."

It will be kept in mind that the restriction placed by section 5219, Revised Statutes U. S., upon taxation of national bank shares by State authority, is, "that the taxation shall not be at a greater rate than is assessed upon other monied capital *in the hands of individual citizens.*"

Congress, being aware that every State is always careful to guard the interests of her *individual citizens*, very properly selected the taxation of "individual citizens" as the standard by which to test the validity of taxation, imposed by State authority, upon national bank shares, knowing that, so long as that restriction be not violated, there could be no danger of any substantial discrimination against national bank shares (in the taxation thereof by State authority).

The *ad valorem* levies, both State and local, upon national bank shares, being the same as those upon "other monied capital in the hands of individual citizens;" no part of the "monied capital in the hands of individual citizens" in Kentucky being exempt from taxation; said shares being assessed for taxation as "monied capital in the hands of individual citizens" is assessed, except as before stated; and there being no discrimination against national bank shares by any assessing officer, it follows: That the "taxation" of national bank shares in Kentucky is not "at a greater rate than is assessed upon other monied capital in the hands of individual citizens," *unless* a discrimination exists by reason of the mode of assessment of that portion of "monied capital in the hands of individual citizens," which is invested in State banks and other institutions of loan or discount. As to "monied capital in the hands of individual citizens" *not thus invested*, the rate of taxation is necessarily the same as that upon national bank shases—the *ad valorem* levies being the same and the mode of assessment being the same as to both.

Does the mode of assessment of "monied capital in the hands of individual citizens" invested in State banks and institutions of loan or discount discriminate against national bank shares? If it does, it also discriminates against "monied capital in the hands of individual citizens" not thus invested, and against all real estate and tangible personal property belonging to citizens of Kentucky.

Why would the Legislature of Kentucky discriminate in favor of "monied capital in the hands of individual citizens" that is invested in State banks and institutions of loan or discount against "monied capital in the hands of individual citizens" not

so invested, and against all real estate and all tangible personal property belonging to citizens of Kentucky?

The proposition that article 3, chapter 108, Kentucky Statutes, discriminates in favor of the property embraced thereby, has never been advanced. On the contrary, the evident purpose thereof was to prevent monied capital invested in corporations from escaping any part of the burden of taxation. Said article is well adapted to its purpose, and its practical operation has proven its efficiency in securing the assessment and just taxation of all forms of corporate property, including corporate franchises.

By said article, all tangible property of the corporation is left to be assessed and taxed as that of natural persons, and the nominal "franchise" is made to include all intangible property of the corporation as well as its franchise proper. The value of the "franchise" (including all intangible property) is ascertained by first estimating the total value of the capital stock, and then deducting therefrom the assessed value of all the tangible property. This mode of assessment insures the assessment and taxation of not only the "franchise" proper, but also all the tangible and intangible property of the corporation, including all money, checks, notes, bonds, stocks, bills of exchange, accounts and choses in action.

In Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., 662-664, the bank vigorously contended that said article (art. 3, chap. 108, Ky. Stats.) imposed a greater burden of taxation upon monied capital invested in banks than was imposed by the laws of Kentucky upon "other monied capital in the hands of individual citizens," and was for that reason in conflict with both section 5219, Revised Statutes, and the State Constitution. Now, herein, the complainant Bank's contention is directly the reverse. In that case the Supreme Court did not decide whether or not said contention was well founded in either particular, but placed its decision upon the ground that the State could not tax the franchises or property of national banks at *any rate*.

If said contention on part of the Bank in that case was well founded, the complainant's contention herein is unfounded; because, if said article then imposed a greater burden of taxation upon the property of corporations embraced thereby than was imposed by the laws of Kentucky upon the property of individual citizens, a less burden is now imposed upon national bank shares than is imposed upon State banks.

If said article 3 discriminated, substantially, either in favor

of or against the individual citizen, the same would be in conflict with the State Constitution, and, *pro tanto* void. But the Kentucky Court of Appeals has held that there is no such discrimination in said article, and that the same is constitutional, in so far as the principle of equality in taxation is concerned. (Paducah Street Ry. Co. vs. The County of McCracken, 20 Ky. Law Rep., 1294.)

There being no discrimination by said article in favor of the property embraced thereby or against other property, it follows that the same does not discriminate against national bank shares, they being taxed as other property generally. Hence, the shares of stock in national banks, in Kentucky, are not taxed at "a greater rate" than "is assessed upon other monied capital in the hands of individual citizens." There is, therefore, no conflict between the Revenue Laws of Kentucky, as amended by the act in controversy, and section 5219, Revised Statutes U. S.

See unbroken line of Supreme Court decisions, from Adams vs. Nashville, 95 U. S., 19-22, to First National Bank of Aberdeen vs. County of Chehalis, 166 U. S., 439-441.

III.

Scobee, Sheriff, vs. Bean, &c., decided by Kentucky Court of Appeals on December 14, 1900.

The opinion in above styled case was concurred in by all the members of the Court, the whole Court sitting. Said opinion is decisive of this case. It holds that the shares of stock in national banks in Kentucky were subject to taxation for State and local purposes from 1892 to 1900. This takes away the only semblance of foundation there ever was for the contention that the Act of 1900 was unconstitutional in so far as it applies to past years.

It follows, necessarily, from said opinion, that the retroactive provisions of the Act of 1900 is not an attempt on part of the Legislature to impose taxes for past years upon property which was, during those years, not subject to taxation, but said provisions are simply for the assessment and taxation of property which was, prior to said Act, *subject to taxation* both for State and local purposes. Said Act is, therefore, *curative* in its nature, and as to past years, only provides for the assessment and collection of taxes on property theretofore *subject* to the same, but which had escaped taxation on account of a misunderstanding on part of the Legislature of 1892, and the resulting confusion in the

statute law of Kentucky relative to the taxation of national bank shares.

Said opinion also holds that article 3, chapter 108, of Kentucky Statutes, does not discriminate in favor of the corporations embraced thereby against national bank shares, and that the Revenue Statutes of Kentucky do not conflict with section 5219, Revised Statutes U. S.

Said opinion does not controvert the conceded proposition that, under any system of State taxation, revenue officers may, by mal-administration thereof, discriminate against national bank shares. But if that in any case be true, the same must be made to appear as any other fact—by pleading and proof. There is no complaint of any such action on the part of officers in this case. (22 Ky. L. Rep., 1076.)

IV.

Burden of Proof—Doubt in Mind of the Court.

In Sinking Fund Cases, 99 U. S., 700, Chief Justice Waite said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt." And in Powell vs. Pennsylvania, 127 U. S., 684, Justice Harlan reiterated the same with approval.

Said principle is now unalterably established, and is uniformly acted upon by the courts, both State and Federal.

AS TO THE PLEA OF ESTOPPEL HEREIN.

1st. Since the adjudication in 1895 (upon which complainant solely relies) the same has been overruled by the Kentucky Court of Appeals (Bank Tax Cases, 39 S. W. Rep., 1030) and also by this Court in Citizens Savings Bank of Owensboro vs. City of Owensboro, 173 U. S. Besides, since said adjudication, shares of stock in national banks of Kentucky have been expressly subjected to State and local taxation by legislative enactment. (Acts 1900, page 65.) Hence the question of the liability of complainant to the taxes in controversy is a different question from that involved in the said former adjudication. (City of Newport vs. Masonic Temple Association, 20 Ky. L. Rep., 266.)

Whether or not article 2 of the Hewitt bill constituted an irrevocable contract, was a question of law, not of fact. Hence, as said by Justice Bradley, in South Ottowa vs. Perkins, 94 U. S., page 267, "The doctrine of estoppel is totally inadmissible in the case."

2nd. The former adjudication relied on by complainant herein was only as to 1893 taxes, and same is not conclusive in another litigation as to any other year's taxes, in Kentucky. That is the settled law in Kentucky as to the effect of former judgments in tax cases. (City of Newport vs. Commonwealth, 21 Ky. L. Rep., 42; Louisville Bridge Co. vs. City of Louisville, 22 Ky. L. Rep., 703, and authorities therein cited.) Such also is the law as to the effect of former judgment in tax cases in the states of Tennessee, Iowa, Michigan and other states. (Union and Planters Bank vs. Memphis, 46 S. W. R., 557; Davenport vs. Chicago & R. I. Ry., 38 Ia., 633; Lake Shore, &c., Ry. vs. People, 46 Mich., 208.)

In Keokuk & Western Ry. vs. Missouri, 152 U. S., 314, this Court said: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action." The same principle was reaffirmed in Nesbitt vs. Riverside Independent District, 144 U. S., 610. See also 146 U. S., 279 and 302. Whatever diversity of authority or difference of opinion there may be on the subject of *res judicata* in tax cases, generally, all the authorities agree that the courts of other States and of the United States will (if they are advised thereof) give the same effect to the judgments of a State Court as the courts of the State in which the judgments were rendered gave the same. This is in compliance with section 905, Revised Statutes of the United States. This principle was settled by this Court in Mills vs. Duryee, 7 Cranch, 484, and has been adhered to by this Court ever since. See 13 Peters, 324; 5 Wallace, 290; 18 Wallace, 457; 140 U. S., 264; 161 U. S., 384. The same principle was recognized and applied by this Court in New Orleans vs. Citizens Bank, 167 U. S., 385. Had the effect, as an estoppel, due such judgments in Kentucky been settled by the Kentucky Court of Appeals in 1899, when the Bank tax cases from Kentucky were decided by this Court, the same effect would have been given said judgments by this Court as are given them by the Courts of Kentucky—and, consequently, the plea of estoppel by the Banks in those cases would not have been sustained by this Court.

3rd. In the light of the decision of this Court in the case of Owensboro Nat. Bank vs. Owensboro, 173 U. S., 665, the alleged Hewitt bill contract was, from the beginning, illegal and void as to national banks. The same requires taxa-

tion of not only the stock of the bank but also the "surplus, undivided surplus, undivided profits, undivided accumulations" in excess of ten per cent. in value of the stock, makes the cashier and his sureties liable for same and also twenty per cent. penalty in the event of non-payment. (General Stats. Ky., page 1039.) According to said decision of this Court, the taxation of national banks as provided in said Hewitt bill, was unauthorized, illegal and void—and the attempt on the part of "a majority in the interest of a quorum" of the stockholders to bind the banks and the other stockholders to such taxation was clearly *ultra vires*, and beyond the power of the stockholders agreeing thereto. Hence, there could not have been any binding contract between the State and national banks by virtue of the Hewitt bill. The question here suggested (as to obligation of Hewitt bill upon national banks) was not considered nor determined by the court, nor suggested by any litigant or counsel in said former adjudication, and hence is not *res adjudicata* in any subsequent suit upon a different cause of action. (Cromwell vs. Sac., 94 U. S., 351.)

The proposition, that the Hewitt bill constituted a valid and irrevocable contract between national banks and the State, not being reconcilable with the said decision by this court in Owensboro Nat. Bank vs. City of Owensboro, 173 U. S., the said adjudication by the Kentucky Court of Appeals, in 1895 (now relied on by appellee as an estoppel) operates as a "*judgment*" estoppel, upon the principle announced in Packet Co. vs. Sickles, 24 Howard, 333-341—that is, it prevents a relitigation of the same case. But it is not available in this case as a "*verdict*" estoppel, upon the principle enunciated in Cromwell vs. Sac, 94 U. S., 351.

This being a different case, and for different years' taxes, from that decided in 1895, the judgment of 1895 is available herein, if at all, only as a "verdict" estoppel. (Bigelow on Estoppel, 5th ed., pages 100 and 101.) It is not good as a "verdict" estoppel, because the issue now being tried—whether or not the Hewitt bill ever constituted a valid and irrevocable contract with national banks (That is, whether or not the same was constitutional as to national banks?)—was not *presented, considered*, nor *determined* in the said litigation of 1895.

THERE IS NO SUFFICIENT GROUND FOR THE EXERCISE OF EQUITABLE JURISDICTION HEREIN.

It appearing that the bank is not, in truth, protected by irrevocable contract, there is no equity in the bill. The bill does

not present a cause of action that is cognizable in equity. In support of the foregoing proposition, as to equitable jurisdiction, we need not cite any other authority than "Foster's Federal Practice," 2nd edition, vol. 1, sec. 12. The positionof the bank herein is precisely the same as if it were asking the Chancellor to aid in giving effect to a judgment upon a promissory note shown by its bill to have been paid and satisfied before rendition of the judgment thereon. It is so obviously fair, just and right, that taxation should be equally apportioned among the beneficiaries thereof, that the courts have uniformly held and now all hold: That, where any person claims immunity from equal taxation, he must establish the exemption beyond doubt. That principle applies with increased force to cases in which the claim of exemption is based solely upon a technical estoppel against the truth. Bigelow on Estoppel, 5th edition, page 706, says: "The estoppel by record is legal, and hence, to give a court of equity jurisdiction to entertain it, it would be necessary to show some equity apart from the estoppel." An additional reason against the equitable jurisdiction herein is, that the complainant's proper remedy is at law. By paying taxes claimed by the city of Covington, complainant could avert all the alleged injuries complained of in the bill, except the loss of the amount of money in controversy, and by a suit at law to recover same with interest and cost, the bank could recover the same if it be legally entitled thereto. The bill only purports to show a strictly legal right to the exemption from taxes. The bill shows that the city of Covington is in equity and good conscience entitled to the taxes claimed, but proposes to override and defeat that equity of the city by means of "a technical estoppel against the truth." The Statutes of Kentucky provide for the recovery of illegal taxes paid under protest or compulsion, making complainant's remedy at law complete and ample for the protection of all the bank's rights in controversy herein. (Covington vs. Powell, 2 Met., 231; Louisville vs. Henning, 1st Bush, 382; Louisville vs. Anderson, 79 Ky., 344.)

The foregoing does not contravene the jurisdiction exercised by Judge Taft in Bank of Ky. vs. Stone, &c., and other cases heard therewith, 88 Fed. Rep., 385–398.

The grounds upon which Judge Taft exercised equitable jurisdiction in said cases were (1) inadequacy of the remedy at law, and (2) the avoidance of a multiplicity of suits. (88 Fed. Rep., 390–392.) Neither of said grounds for the exercise of equitable jurisdiction exists in this case.

Appellants respectfully ask of this Honorable Court, that the judgment below be reversed, and that the appellants' right to enforce the payment of city taxes under said act of the Kentucky Legislature be upheld, or else, that the case be dismissed for want of equitable jurisdiction. We concede that the plea of estoppel is good as to taxes for the year 1893 (that involved in the 1895 litigation), though the court below did not think so.

F. J. HANLON, City Solititor,
HARVEY MYERS and
W. H. JULIAN,
For Appellants.

AUTHORITIES.

CONSTITUTIONALITY OF THE ACT OF MARCH 21, 1900.

1st. Upon the subject generally, see:

Marion County vs. L. & N. R. R. Co., 91 Ky., 388;
Butler vs. City of Toledo, 5 Ohio St., 225; and
First National Bank vs. Commonwealth, 9 Wallace, 353.

2nd. As to liability of national bank shares to taxation from 1892 to 1900, see

Constitution Kentucky, sections 170, 171, 172 and 174;
Kentucky Statutes, sections 4020, 4022, and the charters of first, second, third, fourth, fifth and sixth classes, incorporated in Kentucky Statutes;
Scobee, Sheriff, vs. Bean, &c., 22 Ky. L. Rep., 1076.

3rd. As to city's lien, see:

Kentucky Statutes, sections 3375 and 3176;
Board of Councilmen vs. Mason & Foard Co., 100 Ky., 48;
Blackwell on Tax Titles, 5th ed. (1889), secs. 324 and 327.

4th. As to the proper situs for the taxation of such shares, see:

Revised Statutes, U. S., section 5219,
Kentucky Statutes, article 3, chapter 108; and section 171, State Constitution, which requires uniformity; also Maltby vs. R. & Col. Ry. Co., 52 Pa. St., 140.

5th. As to discrimination, see:

Paducah Street Ry. Co. vs. The County of McCracken, 20 Ky. L. Rep., 1294;
See also unbroken line of Supreme Court decisions, from Adams vs. Nashville, 95 U. S., 19–22, to First National Bank of Aberdeen vs. County of Chehalis, 166 U. S., 439–441.

6th. As to the whole case, see:

Scobee, Sheriff, vs. Bean, &c., decided by Kentucky Court of Appeals on December 14, 1900, 22 Ky. L. Rep., *1076*.

7th. As to burden of proof, and doubt in mind of the Court, see:

Sinking Fund Cases, 99 U. S., 700; and
Powell vs. Pennsylvania, 127 U. S., 684.

8th. As to retrospective assessments in Kentucky, see:

Kentucky Statutes, sections 4090 and 4241; also
Louisville and Jeffersonville Ferry Co. vs. Commonwealth, 22 Ky. L. Rep., 446.

AS TO THE PLEA OF ESTOPPEL HEREIN.

1st. The question of the Appellee's liability to the taxes in controversy is a different question from that involved in former adjudication.

Kentucky Acts of 1900, page 65;
City of Newport vs. Masonic Temple Association, 20 Ky. L. R., 266;
Citizens Savings Bank of Owensboro vs. City of Owensboro, 173 U. S.

2nd. The plea of estoppel herein would not be good in the courts of Kentucky—and, hence, is not good in this court:

City of Newport vs. Commonwealth, 21 Ky. L. R., 42;
Louisville Bridge Co vs. City of Louisville, 22 Ky. L. R., 703;
Also 46 S. W. R., 557; 38 Ia., 633; 46 Mich., 208;
Keokuk & Western Ry. Co. vs. Missouri, 152 U. S.; 144 U. S., 610; 146 U. S., 779 and 302.

The Federal Courts follow the State Courts on that subject:

Rev. Seats., U. S., section 905;
Mills vs. Duryee, 7 Cranch, 484;
13 Peters, 324; 5 Wallace, 290; 18 Wallace, 457; 140 U. S., 264.

3rd. The Hewitt Bill was unconstitutional as to national banks. This subject was not presented, considered nor determined in the said litigation of 1895, and is not res judicata in this case, except as to the taxes for 1893.

Cromwell vs. Sac, 94 U. S., 351;
Bigelow on Estoppel, 5th ed., pages 100 and 101.

THERE IS NO SUFFICIENT GROUND FOR THE EXERCISE OF EQUITABLE JURISDICTION HEREIN.

Foster's Federal Practice, 2d ed., vol. 1, sec. 12;
Bigelow on Estoppel, 5th ed., page 706;
Covington vs. Powell, 2d Met. (Ky.), 231;
Louisville vs. Henning, 1st Bush, 382;
Louisville vs. Anderson, 79 Ky., 344.

No. 255.

MAR 5 1902
JAMES H. McKENNEY, Clerk.

Supp'l Brf. of Hanlon, Myers & Julian for Appellants.

Filed March 5, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

CITY OF COVINGTON, ET AL. ..... Appellants,

vs. } In Equity.

FIRST NATIONAL BANK OF COVINGTON, KY. ..... Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

F. J. HANLON, City Solicitor,
HARVEY MYERS and
W. H. JULIAN,
For Appellants.

Standard Printing Co., Frankfort, Ky.

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FIRST NATIONAL BANK OF COVINGTON, KY. ..... Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

AS TO THE PLEA OF ESTOPPEL HEREIN.

I.

APPELLEE ESTOPPED BY JUDGMENT BELOW.

There having been no appeal by the appellee from the judgment below herein, the appellee is estopped by the judgment below in so far as the same was adverse to the appellee. The court below, herein, expressly held (1), that the Hewitt bill never constituted an irrevocable contract, and (2), by necessary implication, also held that the plea of estoppel relied on by appellee was and is unavailable herein. Hence, the appellee is now *estopped* from claiming in this court that the Hewitt bill constituted an irrevocable contract, and is also estopped from now insisting in this court upon the plea of *res judicata* made and overruled in the court below.

The original bill of complaint by appellee was filed herein on July 23, 1900. The said bill set forth two, and only two, grounds for injunction, namely—1st, the proposition of contract under the Hewitt bill, and 2d, the proposition of estoppel by a former judgment. The

appellee prayed judgment of the lower court as to each, and both, of said two propositions—and prayed that the city of Covington and its officers be enjoined from violating the bank's said alleged contract "*during the corporate existence*" of the bank—in other words, until November 17, 1904. (Record, page 13.)

On the same day that said original bill was filed (July 23, 1900), appellee entered a motion for injunction and notice was executed upon said city and its assessor, that the appellee (complainant) would, "on the 31st day of July, 1900, at 12:15 p. m., in chambers, at the Federal Court building, in the city of Louisville, Kentucky, apply to the Honorable Walter Evans, Judge of the United States Circuit Court for the District of Kentucky, for a temporary injunction, in accordance with the prayer of the bill of complaint herein." (Record, pages 28 and 29.)

What was done in chambers at Louisville on said July 31, 1900 (if anything), the record does not show. However, the record does show that no injunction or restraining order was issued on that day, or at any time *upon said original bill of complaint.*

The record also shows that, fourteen days after the said July 31, 1900, on August 14, 1900, the appellee filed an "amended bill of complaint," alleging that the act of March 21, 1900, was in conflict with section 5219 of the Revised Statutes of the United States, and that the said act was null and void.

The said amended bill also declares that the said act conflicts with the Constitution of the United States in divers other respects. (Record, page 30.)

On the same day that said amended bill was filed, August 14, 1900, the temporary injunction herein was granted by the court below. (Record, page 58.)

It is plain, therefore, that the injunction was granted upon the said allegations of the amended bill, and that

the original bill was regarded by the court below as insufficient to authorize *any* injunction.

The said temporary injunction granted was not the temporary injunction sought by the appellee and prayed for in the bill of complaint. It did not recognize the existence of the said proposition of contract, nor did it recognize the soundness of the said proposition of estoppel by former judgment. On the contrary, the order of injunction was diametrically inconsistent with each and with both of said propositions. It expressly permitted the assessment of the shares of stock for taxation under the levies of 1900 and subsequent years, thus refusing and rejecting the appellee's claim to exemption under the Hewitt law during its corporate existence, which does not terminate until November the 17th, 1904.

Said temporary injunction was perpetuated on Dec. 17th, 1900, upon the grounds stated in the opinion of the court below.

That opinion expressly declares that the former judgment holding that the Hewitt bill constituted an irrevocable contract was "*palpably erroneous.*" Among other things, the said opinion declares as follows:

> "Within a year or so after this judgment was rendered, and from which no appeal could be taken to the Supreme Court of the United States for the reason already indicated, the Court of Appeals overruled the doctrine which it had therein announced, and expressly held that there was no contract growing out of the facts adjudicated in the previous litigation. (39 S. W. Rep., 1030.)
>
> "It was there also held that legislation as to the manner of imposing taxation could not be made the basis of a contract, but was a matter entirely under the control of the State and might be altered at its pleasure. In the case of The Citizens Savings Bank, &c., vs. Owensboro, 173 U. S., 636, the Supreme Court sustained in the fullest manner the last view taken of the question by the Court of Appeals of Kentucky; so

> that we have here the claim to the benefit of the doctrine of *res judicata* as against the clearest decision that the judgment relied on was based upon a proposition, not of fact but of constitutional law, *which has been utterly repudiated, not only by the highest judicial tribunal in Kentucky which announced it, but also by the Supreme Court of the United States itself.*" (Record, page 56.)

Hence, we did not misrepresent the opinion or the judgment of the court below when we stated in the beginning of this paragraph that "the court below, herein, expressly held (1), that the Hewitt bill never constituted an irrevocable contract, and (2), by necessary implication, also held that the plea of estoppel relied on by appellee was and is unavailable herein."

The appellee bank excepted to said judgment below; but took no appeal therefrom. A judgment can only be reversed, on appeal, for error *to the prejudice of the appellant*. Therefore, the judgment below as to the appellee's propositions of "*contract*" and "*estoppel*" stands a final judgment in those respects, and operates as a complete *estoppel* against the appellee, in so far as its claim herein to contract rights or to protection by estoppel are concerned.

The appellee asked and obtained the opinion and judgment of the court below as to those questions and is concluded thereby in the trial of this appeal. Each of said two issues was distinctly presented by the pleadings and determined by the court below adversely to the appellee bank. The court below, having expressly determined that the Hewitt bill never constituted an irrevocable contract, the perpetuation of the injunction granted permitting assessments for 1900 and subsequent years (anterior to Nov. 17th, 1904) necessarily involved said question of estoppel and a determination thereof adversely to the appellee bank.

The case of "The Chattahoochee," 173 U. S., 540, was argued in this court on May 3 and 4, 1898, and reargued on March 6, 1899. Same was decided April 3, 1899. The opinion was delivered by Mr. Justice Brown. In statement of the case, this court said:

> "This was a libel for a collision which took place in the early morning of July 20, 1894, southeast of Nantucket Sholes, between the Canadian schooner Golden Rule and the American steamship Chattahoochee, resulting in the total loss of the schooner and her cargo. * * * The district court was of opinion that both vessels were in fault for immoderate speed, and that the damages should be divided.
>
> " * * * Upon appeal to the Circuit Court of Appeals, that court affirmed the decree of the district court; but modified the same with reference to the distribution between the owners and master of the Golden Rule on the one side and her mate and crew on the other. * * (33 U. S. App., 510.)
>
> "Whereupon an application was made to this court by the libelants for a writ of certiorari, which was granted."

Mr. Justice Brown, delivering the opinion of this court, on appeal by owners of the Golden Rule and her cargo (libelants), said:

> "There can be no doubt whatever of the liability of the steamer, and *as she did not appeal, of course she is estopped to deny such liability in this court.*"

It is familiar law, that "*an estoppel against an estoppel sets the matter at large.*" (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

II.

CHARACTER OF ESTOPPEL PROPOSED BY APPELLEE.

What was proposed by the appellee in the court below as an estoppel?

It was a judgment of the Campbell Circuit Court (Ky.), rendered on Jan. 31, 1894, simply enjoining the city and its officers from attempting to collect any part of $14,892.43, city taxes for the year 1893—which judgment was affirmed by the Court of Appeals on December 2, 1895. (Record, page 26.)

The suit for said injunction was to restrain the city and officers from collecting said amount of taxes upon the *franchise* of the bank under the revenue act of 1892. The appellee bank, in that suit, expressly alleged that its "franchise" was not subject to taxation by the city of Covington. "Plaintiff says that its franchise is not subject to taxation by defendant." (Record, page 20.)

The opinion of the Campbell Circuit Court in said suit, after arguing the question of the Hewitt bill contract without announcing the court's conclusion as to that question, concludes as follows:

> "Another reason why this tax cannot be collected of these plaintiffs is that *they are national banks.*
>
> "This is not a tax on the shares of their capital stock; it is a tax on their franchises.
>
> "National banks are the instrumentalities of the federal government to provide a national currency.
>
> "To allow the State to tax their franchises is to permit the States to destroy this agency of the federal government to accomplish the purposes of that government.
>
> "McCullock vs. State of Maryland, 4 Wheat., 317; Osburne vs. United States, 9 Wheat., 739.
>
> "For these reasons the demurrer will be overruled." (Record, page 25.)

Of course, therefore, neither the said judgment of the Campbell Circuit Court, nor the affirmance thereof by the Court of Appeals, nor the opinion of the Campbell Circuit Court, nor all of them combined, constitute an estoppel in this case.

The opinion of the Court of Appeals, rendered at the time of the affirmance of said judgment, is not entirely clear in its application to *national banks.*

It related principally to the case of *State banks*, and proceeded very largely upon the idea, that the State banks being taxable only under the Hewitt law, the national banks could not be taxed under the revenue act of 1892, without violating the Constitution and laws of the United States.

Said opinion cites City National Bank of Paducah vs. The City of Paducah, 10 Ky. L. R., 221, and Covington City National Bank vs. City of Covington, 21 Fed. Rep., 484, undertakes to avoid the force of the decision of this court in Lionberger vs. Rouse, 9 Wallace, 468, and plainly *assumes* that national banks must be taxed as the State banks generally are taxed. Said opinion also *assumed* that the legislature of 1886 possessed the power to enter into the Hewitt bill contract with national banks. The power of the Legislature in that regard was not considered nor determined. The opinion was confined entirely to the subject of the proper *construction* of the Hewitt law. Besides, it was not *material* to the rights of the appellee bank, in that litigation, what the proper construction of said law was. Being a national bank, its franchises were not subject to taxation under the revenue law of 1892. The said judgment of the Campbell Circuit Court was proper. The said affirmance thereof by the Court of Appeals was proper.

It was entirely unnecessary to the said affirmance or to a proper adjudication of the rights of the appellee bank, in that litigation, for the court to construe the Hewitt law. Hence, the said opinion (in so far as it related to the appellee) was, at most, only an *unnecessary erroneous* expression of opinion as to an *immaterial* matter, which had been improperly brought into the case.

There are two reasons why said construction was not material to the rights of either party to said litigation:

1st—The franchises of national banks were not taxable under the act of 1892, *regardless of said construction;* and, 2d—there was no power in the legislature and a majority in interest of the stockholders of national banks to bind the banks and their stockholders by such a contract, *regardless of said construction.*

Where a judgment is affirmed or reversed on appeal, and the judgment affirming or reversing is supported by an opinion written by a single member of the court, the opinion is not binding as the judgment of the court except in so far as it is *necessary* to the affirmance or reversal or is expressly concurred in by a majority of the court.

In said litigation the opinion was written by Judge Pryor. Three of the seven members of the Court of Appeals (Judges Lewis, Paynter and Guffy) expressly dissented therefrom. Three of the judges (Judges Eastin, Hazelrigg and Grace) tacitly acquiesced in the affirmance.

Judges Eastin, Hazelrigg and Grace, seeing that the judgment of the Campbell Circuit Court should be affirmed as to the appellee herein (First National Bank of Covington) upon the grounds stated in the opinion of said Campbell Circuit Court, tacitly acquiesced in the affirmance while they may have been undecided as to the contract question involved, in its application to national banks.

As to the state banks involved in said litigation, the case was radically different from that of the national banks. As to the state banks, a construction of the Hewitt bill was *necessary*, in each case, to an affirmance or reversal.

CERTAINTY is of the very *essence* of estoppel. If there be any uncertainty or doubt as to the application of the doctrine of estoppel to the case being tried, *there is no estoppel.* (Bigelow on Estoppel, 5th Ed., pages 61, 366, 578, and authorities there cited.)

However, and independently of the foregoing, since the said opinion by Judge Pryor, it having been deter-

mined and settled that the Hewitt law never was an irrevocable contract and was repealed by the revenue act of 1892, the legislature of 1900, on March 21, 1900, expressly subjected the shares of stock in the appellee bank to the proposed taxation. That it was within the power of the legislature of 1900 to do so, is unquestionable. The legislature did not thereby impair the obligation of any contract. It did not thereby divest the appellee of any right to which it was in truth and justice entitled. It may have thereby limited the effect of the said opinion as a technical estoppel. But the effect that should be given a judgment of a State court as an estoppel is a matter entirely within the discretion of the legislature of the state in which the judgment is rendered.

The effect of state court judgments is governed by "the courts, laws and usages" of the state in which they are rendered." (Rev. Stats. U. S., sec. 905; Phoenix Ins. Co. vs. Tennessee, 161 U. S., 185.)

That the Court of Appeals of Kentucky may (within the limits of the statute law of Kentucky) determine the effect as an estoppel that should be given said opinion of 1885, will not be questioned. *A fortiori*, the power of the legislature of 1900 to adopt said act and thus destroy the effect of said opinion as an estoppel herein, must be conceded. All that the legislature of 1900 possessed the power to do, in that regard, was done by the adoption of said act. The language and expressed object of the act show plainly, that the legislature intended thereby to place all national banks, without any exception, upon the same footing with each other and with the state banks in respect to taxation, in so far as it was within the power of the legislature to do so.

This court will take judicial notice of the fact that said legislature of 1900 repealed the charters of all the state banks of Kentucky which claimed exemption from taxation by virtue of the said erroneous adjudication of 1895. (Acts, 1900, Ky., —, page 88.)

Where events transpire after a judgment, affecting the rights in controversy in the former suit, the judgment does not operate as an estoppel in a subsequent suit founded on a different cause of action from that of the former suit. (Freeman on Judgments, 4th ed., sec. 329, and authorities there cited.)

Lastly, in respect to the subject of this paragraph, it is essential to the estoppel by "former verdict," not only that the issue in the subsequent suit be identical with that in the former suit, but also that the *circumstances* of the two suits must be the same.

In New Orleans vs. Citizens Bank, 167 U. S., Justice White emphasized that principle—that the issue in the two suits must be identical, and must arise under the "*same circumstances and conditions*" in the second as in the former action.

It will not be seriously contended that the circumstances of this controversy are the same as those under which the said opinion by Judge Pryor was rendered. Under the circumstances of this case, Judge Pryor's opinion of 1895 would have been directly the reverse from what it was.

It is also a fundamental principle of the estoppel by "former verdict," that a judgment in a former suit does not preclude the parties, in a subsequent suit on a different cause of action, from bringing forward grounds of recovery or defense which were not actually brought forward and determined in the former suit. (Cromwell vs. Sac., 94 U. S., 351; and Gould vs. Evansville, &c., R. R. Co., 91 U. S., 534.)

In this case, the appellants rely upon several grounds of defense that were not considered nor determined in the said former litigation, namely:

1st. That the Hewitt law contract, in its application to national banks, was in violation of sec. 5219 of Rev. Stats. U. S.)

2nd. That it has now been settled by repeated adjudications that said law was not irrevocable and was repealed in 1892—a defense that would have defeated the former suit and prevented the judgment now relied on by appellee as an estoppel.

3rd. The act of March 21, 1900, before referred to.

Hence, the plea of estoppel by appellee was properly overruled by the court below.

III.

THE ESTOPPEL PROPOSED BY APPELLEE SHOULD NOT PREVAIL IN THIS COURT, BECAUSE THE SAME WOULD NOT PREVAIL IN THE COURTS OF KENTUCKY.

What effect as an estoppel should be given the judgment relied on by appellee herein?

In the case of Mills vs. Duryee, 7 Cranch, 484, this court, having under consideration the question above propounded, after discussing the constitutional provision and act of Congress on the subject, Justice Story delivering the opinion, said:

> "It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered, * * * and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

In the case of Hampton vs. McConnel, 3 Wheaton, 234, this court, Chief Justice Marshall delivering opinion of the court, said:

> "This is precisely the same case as that of Mills vs. Duryee. The court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States,

which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

To the same effect is McElmoyle vs. Cohen, 13 Peters, 326; Christmas vs. Russell, 5 Wallace, 290; Thompson vs. Whitman, 18 Wallace, 457; Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184.

Besides, the same being a non-federal question, in which only citizens of Kentucky are concerned, this court will, for that reason alone, follow the state court decisions on that subject. (Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184; Abraham vs. Casey, 179 U. S., 218.)

We have, therefore, only to ascertain the effect as an estoppel given to such judgments, as that relied on by appellee herein, "by the courts, laws and usuage" of Kentucky. Would the same be a good plea of estoppel in the courts of Kentucky?

In the case of City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 47 (decided April 26, 1899), the Kentucky Court of Appeals said:

> "The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. * * * * *
>
> "The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in invitum. The tax-payer does not agree to pay but is forced to

pay, and *the right to litigate the legality of a tax* UPON ALL GROUNDS *must of necessity exist, regardless of former adjudications as to the validity of a different tax.* * * *

"The decision of the circuit court as to the taxes for 1893 is not binding upon this court as to the taxes for subsequent years."

"It follows, therefore, that the judgment must be affirmed.

"The whole court sitting."

It matters not, therefore, *upon what ground* the exemption is claimed in the former suit—whether that of contract, or that the property is used for governmental purposes, or that it is exempted by statute, or that the exemption claimed is a vested or constitutional right—whatever the ground of exemption relied on and litigated in the former suit as to one year's taxes, the adjudication (according to the foregoing decision), is not conclusive as to the same matters of fact or law in a subsequent litigation between the same parties as to any other year's taxes.

The above doctrine, announced by the Kentucky Court of Appeals in 1899, in the foregoing case, has been uniformly adhered to by that court ever since, and has been reasserted by the same court in numerous cases between the date of said decision and the present time.

The next Kentucky case involving the same question was that of the Louisville Bridge Co. vs. The City of Louisville, 22 Ky. L. Rep., 703 (decided Oct. 17, 1900)—in which the Court of Appeals said:

"In response to appellant's plea of *res judicata*, it may be said that this identical question was before the court in the case of the Henderson Bridge Co. vs. The City of Henderson, decided June 24, 1896, and in the very recent cases of Newport vs. Masonic Temple Co., 20 Ky. L. Rep., 266, and The City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42. It was held

that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and as the question is fully considered in these cases it is unnecessary to elaborate it again."

On the same subject, in the case of Negley, Sheriff, vs. City of Henderson, 59 S. W., 19 (decided Nov. 21, 1900), a Kentucky case, the Court of Appeals said:

> "This brings us to consider the question of *res judicata*. It was, in City of Newport vs. Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year."

The next case to same effect, in Kentucky, was that of Bell County Coke and Improvement Co. vs. The City of Pineville, 23 Ky. L. Rep., 933 (decided October 4, 1901). The substance of the decision is stated in the syllabus as follows:

> "A judgment enjoining the collection of a tax for one year does not prevent the collection of a tax for another year."

The opinion, after stating the case and coming to the plea of *res judicata*, said:

> "The case of the City of Newport, &c. vs. Commonwealth, 21 Ky. Law Rep., 42, is decisive of the question raised by the plea of *res judicata*."

The case of the Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort, 23 Ky. Law Rep., 1285 (decided on Nov. 19th, 1901), involved the same question. Exemption was claimed by the bank on the ground of a former adjudication of contract in a litigation as to taxes for the years 1895, '6, '7 and '8. The court, holding the plea of estoppel to be unavailable, said:

"It is not necessary for this court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the federal court proceeding. However, we do hold that the judgment of the federal court is not a bar to a recovery of the taxes for the years 1893 and 1894.

"This court, in City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42; Louisville Bridge Co. vs. City of Louisville, 22 Ky. Law Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

The last-named case was followed, on Dec. 19th, 1901, by the case of Lou. Bridge Co. vs. City of Louisville, 65 S. W. R., 814. The plea of estoppel by *res judicata* was interposed as a ground of exemption. But the Court of Appeals (Ky.) said: "The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for us to consider this question: It having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes for one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's taxes"—(the court here citing with approval the Kentucky cases on that subject above referred to in this brief.)

In the case of Douglas vs. Commonwealth, 15 Ky. L. Rep., 581, the Court of Appeals held the same character of judgment, as that now relied on by appellee, to be no estoppel *solely upon the ground that the former judgment was erroneous and had been overruled.*

The court, on that subject, said:

"It is contended that the subject of the appellee's right is *res judicata* in this court. It is sufficient to say that the state had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right

of the State to repeal it; and the decisions of this court that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been virtually overruled by the Supreme Court of the United States (the fact that the said decisions by this court have been overruled), destroys the contention of the *res judicata*."

The opinion last cited was affirmed by this court, in Douglas vs. Kentucky, 168 U. S., 488.

There can be no doubt, therefore, what effect as an estoppel the Kentucky Court of Appeals would give the judgment relied on herein by the appellee as an estoppel, if this case were pending in that court.

Viewed in the light of the Kentucky decisions alone, the same is not an estoppel in this case.

Hence, under the now well established principle first announced in Mills vs. Duryee, 7 Cranch, and adhered to by this court ever since, the plea of estoppel by appellee is not available herein.

We submit that the plea of estoppel by appellee should not prevail in this case.

F. J. Hanlon, City Solicitor,
Harvey Myers and
W. H. Julian, *W. H. McClain*,
For Appellants.

AUTHORITIES.

I.

APPELLEE ESTOPPED BY JUDGMENT BELOW.

The case of "The Chattahoochee," 173 U. S., 540; Bigelow on Estoppel, 5th ed., page 360, and authorities there cited.

II.

CHARACTER OF ESTOPPEL PROPOSED BY APPELLEE.

(1). Certainty is of the very essence of estoppel. Bigelow on Estoppel, 5th ed., pages 61, 366, 578, and authorities there cited.

(2). Subsequent events prevent estoppel by former judgment. (Freeman on Judgments, 4th ed., sec. 329, and authorities there cited.)

(3). The issue in the two suits must be identical, and must arise under "the same circumstances and conditions" in the second as in the former suit. (New Orleans vs. Citizens Bank, 167 U. S., 371.)

(4). Former judgment does not estop as to grounds not actually determined in former suit. (Cromwell vs. Sac., 94 U. S., 351; Gould vs. Evansville, &c., R. R. Co., 91 U. S., 534.)

[OVER]

III.

THE ESTOPPEL PROPOSED BY APPELLEE SHOULD NOT PREVAIL IN THIS COURT, BECAUSE THE SAME WOULD NOT PREVAIL IN THE COURTS OF KENTUCKY.

(1). Mills vs. Duryee, 7 Cranch, 484.
Hampton vs. McConnel, 3 Wheaton, 234.
McElmoyle vs. Cohen, 13 Peters, 326.
Christmas vs. Russell, 5 Wallace, 290.
Thompson vs. Whitman, 18 Wallace, 457.
Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184.
Abraham vs. Casey, 179 U. S., 218.

(2. Kentucky cases).

City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 47 (decided April 26, 1899).

Louisville Bridge Co. vs. City of Louisville, 22 Ky. Law Rep. (decided Oct. 17, 1900).

Negley, Sheriff, vs. City of Henderson, 59 S. W., 19 (decided Nov. 21, 1900).

Bell County Coke and Improvement Co. vs. City of Pineville, 23 Ky. L. Rep., 933 (decided Oct. 4, 1901).

Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort, 23 Ky. Law Rep., 1285 (decided Nov. 19th, 1901).

Louisville Bridge Co. vs. City of Louisville, 65 S. W., 814 (decided on Dec. 19, 1901.)

See also the case of Douglas vs. Commonwealth, 15 Ky. L. Rep., 581, which was affirmed by Supreme Court, 168 U. S., 488.

Counsel for appellants omitted, in preceding briefs, to direct attention of the court to the two following cases:

Bohannon, Sheriff, vs. Bank of Shelbyville, 23 Ky. L. Rep., 508, and

Bank of Commerce of Louisville vs. Stone, Auditor, 22 Ky. L. Rep., 70.

The above two cases, in themselves, is a sufficient response to so much of appellee's brief herein as relates to payments improperly made by the appellee bank to persons acting as Auditors of the State, under the Hewitt law after the same had been repealed.

No. 255.

By J. W. Bryan, Cor

The Bobbs-Clarke Company, Printers.

FILED
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JAMES H. McKENNEY,
Clerk.

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No. 255.

Supreme Court of the United States.

OCTOBER TERM, 1901.

The City of Covington and John N. Middendorf, Assessor of the City of Covington, *Appellants,*

vs.

The First National Bank of Covington, Kentucky, *Appellee.*

BRIEF FOR APPELLEE, THE FIRST NATIONAL BANK OF COVINGTON, KY.

JAMES W. BRYAN,
Solicitor for Appellee.

The Robert Clarke Company, Printers. January, 1902.

No. 255.

Supreme Court of the United States.

OCTOBER TERM, 1901.

The City of Covington and John N. Middendorf, Assessor of the City of Covington, *Appellants,*

vs.

The First National Bank of Covington, Kentucky, *Appellee.*

BRIEF FOR APPELLEE, THE FIRST NATIONAL BANK OF COVINGTON, KY.

STATEMENT OF CASE.

The United States Circuit Court for the District of Kentucky, by its judgment rendered on December 17, 1900, perpetually enjoined the City of Covington, Kentucky, a city of the second class in that state, and its city assessor, from making any levy or assessment of taxes on the shares of the capital stock of the First National Bank of Covington, Kentucky, for any time prior to March 21, 1900, and further permitting them to assess said shares for any proper period after said date, enjoined the collection of the tax so assessed until it should be made to appear whether the taxes so

assessed were at a higher rate than permitted by law, and retained control of the case for the purpose of adjudicating and settling any question that might arise on such future assessments, and from that judgment said city and its assessor have prosecuted this appeal.

The bank on July 23, 1900, filed in that court its bill in equity against the city and its assessor, which it, by permission, amended on August 14, 1900, asking that the city and its officers be enjoined from assessing, or attempting to collect tax on the shares of capital stock of the bank for any of the years 1893 to 1900, both inclusive, or from arresting the bank's president or cashier, as they were threatening to do, for not listing for taxation the said shares of stock, and that it be adjudged that the shares of the bank's capital stock were not subject to taxation by the city until November, 17, 1904.

Every allegation of fact made by the bill and the amendment stands *admitted to be true.* Appellants appeared and demurred, and that being overruled they could not, and did not, attempt to controvert any of the allegations by appellee made.

It is admitted by the record:

Appellee is a national bank, incorporated November 17, 1884, under the National Bank Act of Congress, for a term of twenty years, its corporate existence terminating therefore on November 17, 1904, and it is and has, since its incorporation, been located in Covington, Ky.

In December, 1886, the Legislature of Kentucky passed an act, called the "Hewitt Law," for the taxation of all banks in Kentucky, which provided for a contract to be entered into by and between the State of Kentucky upon the one part and the banks, state and national, upon the other, providing:

> "That shares of stock in state and national banks . . . shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations shall, in addition, pay upon each one

hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation as is assessed upon real estate, which shall be in *full of all tax, state, county and municipal.*"

Said act further provided:

"That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed."

Section 4 of said act provided:

"That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right, under the acts of congress or under the charters of the state banks, to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky, shall be evidenced by writing under the seal of such bank and delivered to the Governor of this Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank and its *shares of stock* shall be exempt from all other taxation whatsoever, so long as said tax shall be paid during the corporate existence of such bank." (For the act complete see Appendix to this brief.)

The appellee, on the 22d day of June, 1887, within the time and as by said act provided, filed with the governor of the State of Kentucky its agreement and acceptance thereunder. The cashier of appellee has, on the 1st day of July of each and every year since then, including the year 1900, filed with the auditor of public accounts the statement required by the second section of said act, and appellee

has paid the taxes as therein provided of seventy-five cents on each share of stock, etc., to the State of Kentucky for each and every of said years, including *the year* 1900, *which tax has been accepted and retained by the State of Kentucky*. It has also each year paid to the appellant, City of Covington, taxes for municipal purposes assessed by the City of Covington on its banking building.

The State of Kentucky, under the constitution in force in 1886, had the right to enter into this contract with the banks. A new constitution for Kentucky was adopted on the 28th of September, 1891, under which the legislature would have no right to make or authorize such a contract.

In 1892, five years after the making of this contract between the appellee and the State of Kentucky, the legislature passed an act entitled "Revenue and Taxation," which provided, among other things, that each bank should pay what is designated a franchise tax, which, in brief, provided as a mode of taxation the taking of the entire value of its capital stock, surplus, etc., and deducting therefrom the assessed value of its tangible property, the difference being the value of its franchise. The effect of these subsequent constitutional and statutory enactments being to repeal the act of 1886, the Hewitt law, under which the contract was made between the State of Kentucky and the banks, and to thereby subject them and their shareholders to local taxation. In pursuance of this legislation, the appellee's stock and its shares of stock were so assessed for the year 1893 for taxation by the defendant, City of Covington, it being denominated a franchise tax. The appellee insisting that the contract it entered into with the State of Kentucky in June, 1887, under and in pursuance of the Hewitt law of the previous year, was an *irrevocable contract*, and that its shares of stock and all of its property, other than its banking building, were *exempt* from any taxation by the City of Covington until the 17th of November, 1904, the termination of its corporate existence, upon its, the appellee's, compliance with the terms of its contract; and the City of Covington contending that the contract no longer existed, and that the shares of stock and property were subject to taxation by it

for municipal purposes, and that it had a right to collect and exact taxes from it for that purpose, and had the right to collect the taxes imposed for the year 1893, called franchise tax, threatened to distrain the property of appellee therefor. Thereupon the appellee filed in the Kenton Circuit Court its petition in equity against the City of Covington, the appellant herein, the parties to that action being: *The First National Bank of Covington, Kentucky, Plaintiff*, v. *The City of Covington, Defendant*, the said Kenton Circuit Court being a court of full and complete jurisdiction in the premises, both of the parties and of the subject-matter; and the appellee set up in that action the provisions of the act of 1886, the Hewitt law, and the making of its contract with the State of Kentucky thereunder, of its compliance therewith, the subsequent attempted repeal of that law, and *assailed that attempted repeal* upon the *ground* that it was *an impairment of the obligations of the contract* made and entered into by it and the State of Kentucky, asserting and claiming that under that contract its shares of stock, and all of its property, other than its banking building, were exempt during its corporate existence from any taxation by the appellant, City of Covington, and that the city was contending that there was no such contract, but that the same had been repealed, and that shares of stock in appellee and its other property were subject to taxation by it for municipal purposes, and appellee, the bank, by reason of said contract exemption, prayed an injunction against the City of Covington, enjoining and restraining it from collecting or attempting to collect said taxes for the year 1893. Summons was regularly issued, and served upon the appellant, City of Covington, so that it was duly before the said court. At this juncture the judge of the Kenton Circuit Court declined to sit in the said cause by reason of his personal interest in the result, and by agreement of the parties the case was transferred to the Campbell Circuit Court, at Newport, Kentucky, being a court of like jurisdiction with the Kenton Circuit Court. The city appeared and demurred to the petition. Its demurrer was overruled. The facts being correctly set forth in the petition therein, it declined to an-

swer, and thereupon the Campbell Circuit Court adjudged that the contract entered into by and between the appellee and the State of Kentucky, exempting its shares of stock from any local taxation whatsoever, was irrevocable during the corporate existence of appellee, and granted the injunction prayed for. Thereupon the City of Covington prayed and prosecuted an appeal to the Court of Appeals of Kentucky, the court of last resort in that state, from the judgment of the Campbell Circuit Court adjudging such irrevocable contract.

The Court of Appeals on that appeal and in that case specifically and unequivocally adjudged the existence and irrevocability of the contract, and that by reason thereof all the property—other than its banking building—of the bank, appellee here, and its shares of capital stock, were exempt from taxation by the City of Covington, appellant here, during the corporate existence of the bank, until, to wit, November 17, 1904. The bank continued to comply with its adjudged contract.

On March 21, 1900, the legislature of Kentucky passed "An act relating to the taxation of the shares of stock of national banks." (Record, pp. 9, 10.)

This act undertook to authorize the assessment, for both state and municipal purposes, of the shares of stock of national banks, for any year or years since 1892, and to *make the bank liable for the tax.*

The capital stock of this bank, the appellee, during the years 1893, 1894, 1895, 1896, and up to the first day of July, 1897, was $600,000, and upon that day it was decreased from six hundred to three hundred thousand dollars, and the appellee paid to the then shareholders $300,000 in money. During the period from 1893 to the institution of this action, many of the shares of appellee's stock had changed ownership, many being transferred, in many instances holders and owners of its shares had died, and the stock had been distributed among heirs and devisees, and frequently sold to pay debts of the decedent, and many of its shareholders during said period were non-residents of Kentucky, some of whom sold and transferred their stock, and in some cases its

shareholders became insolvent and the stock was sold to pay debts. (Record, p. 31.)

In May, 1900, appellant, Middendorf, assessor of the City of Covington, demanded of the appellee that it list with him for taxation by said city, for all the years from 1893 to 1900, both inclusive, all the shares of its capital stock, and in response, appellee's board of directors adopted a resolution directing its president and cashier not to make such list or report, for the reason that such shares were not subject to taxation by the city, and that it had theretofore been so adjudged. (Exhibit "C," Record, p. 27.) Then the assessor served on the president of appellee a written notice that he list with him said shares for such taxation, for all of said years (Exhibit "D," Record, p. 27.), and because appellee refused to so list said shares of stock, appellants threatened, and were about to have arrested and punished by fine, and compel by process of contempt from the Police Court of said city, appellee's president and cashier to list said shares as aforesaid; this power to so proceed being claimed by appellants under the law governing cities of the second class in Kentucky, and especially sec. 3179, Kentucky Statutes. (Record, p. 11.)

While the act of the legislature attempting to authorize this assessment, for municipal purposes, of the shares of national banks, was passed March 21, 1900, *yet in July following*, it being the time provided for payment in appellee's contract, the State of Kentucky collected from, and still retains, taxes as provided by the contract. (Record, p. 5.)

These facts having been fully set out by the original and amended bill, a complete transcript of the former action between this appellee and the appellant, the City of Covington, having been exhibited therewith, the court granted to appellee an injunction *pendente lite* (Record, p. 58), enjoining appellants from assessing said shares for any time prior to March 21, 1900, and from collecting any tax for any time subsequent thereto until further orders of court. Appellants, as stated, stood upon their demurrer, which was overruled, and refused to answer, and the court granting a perpetual injunction as to assessment or collection of any taxes by City

of Covington on any of said shares prior to March 21, 1900, and permitting the assessment but forbidding the collection of any tax for any time subsequent to that date until further orders of the court, and adjudging appellee its costs (Record, pp. 60, 61), appellants excepted to the judgment, and were granted an appeal to this court.

ARGUMENT.

I.

The Circuit Court had jurisdiction to hear and determine the case presented.

City Railway Co. v. *Citizens' St. R. R. Co.*, 166 U. S. 557;

Bank of Kentucky v. *Stone*, 88 Fed. Rep. 383;

Kembal v. *City of Cedar Rapids*, 99 Fed. Rep. 130;

Southern Railway Co. v. *North Carolina Corp. Com.*, 97 Fed. Rep. 513;

Act of Congress, August 13, 1888, Supplement to Revised Statutes of United States, p. 611;

Sec. 5219 Revised Statutes of United States;

Stone v. *Farmers' Bank of Kentucky*, 174 U. S. 409;

And series of bank tax cases from Kentucky decided by U. S. Supreme Court, Spring Term, 1899, reported in 174 U. S.

Hills, Receiver, v. *National Bank*, 105 U. S. 319.

II.

Under the contract between the appellee and the Commonwealth of Kentucky, it, the appellee bank, and its shares of stock are not subject to taxation by the City of Covington until November 17, 1904; and it having been adjudged in a suit between said City of Covington and the appellee bank that such contract existed, and that the bank and its shares of stock were exempt from taxation by said city until November 17, 1904, the appellant, City of Covington, and its officers are estopped to deny the existence of said contract or said exemption.

That appellee bank and its shares of stock are exempt from taxation by the City of Covington is *res judicata.*

Brownsville v. *Loague*, 129 U. S. 493;
Jeter v. *Hewitt*, 63 U. S., 22 How. 352;
Forsyth v. *Hammond*, 166 U. S. 517;
Cromwell v. *Sac County*, 94 U. S. 351;
Moran Lumber Co. v. *Butchell*, 101 U. S. 638;
Storet v. *Lye*, 103 U. S. 66;
Nesbit v. *Riverside Ind. Dist.*, 144 U. S. 610;
Johnson Co. v. *Wharton*, 152 U. S. 252;
Last Chance Mining Co. v. *Tyler Min. Co.*, 157 U. S. 683;
City of New Orleans v. *Citizens' Bank of Louisiana*, 167 U. S. 371;
Tioga Railroad v. *Blossburg Railroad*, 20 Wall. 142;
Southern Min. Co. v. *St. Paul Co.*, 55 Fed. Rep. 695;
Wilson's Ex'r v. *Dean*, 121 U. S. 529;
Bissell v. *Township of Spring Valley, Cherokee Co., Kan.*, 124 U. S. 225;
Stone v. *Bank of Kentucky*, 174 U. S.;
Stone v. *Farmers' Bank of Kentucky*, 174 U. S. 409;
City of Louisville v. *Louisville Banking Co.*, 174 U. S.;
Thompson, Judge, etc., v. *Louisville Banking Co.*; *Same* v. *Third National Bank of Louisville*, 21 Ky. Law Rep. 1611;
Hardwicke, etc., v. *Young*, 22 Ky. Law Rep. 1906.
Arnold v. *Commonwealth*, 23 Ky. Law Rep. 182.
Davis v. *McCorkle*, 14 Bush, 754.
City of Covington v. *First National Bank of Covington, Ky.*, 97 Ky. 590.

III.

The act of March 21, 1900, impairs the obligation of a contract, undertakes to take the property of appellee and its shareholders without due process of law and without just compensation, and denies to it the equal protection of the laws, and is repugnant to the laws of the United States, and

is retroactive and violative of rights acquired under the law, as held and declared to be.

Constitution of the United States, Art. I, Sec. X;

Amendments to Constitution of the United States, Arts. V and XIV;

Revised Statutes of the United States, Sec. 5219;

Franklin County Court v. *L. & N. R. Co.*, 84 Ky. 59.

JURISDICTION.

I.

There can be no serious question that the bill, as amended, presented a cause of action cognizable in equity, and proper for the courts of the United States to consider and determine.

> "A claim by a corporation in good faith that it has a contract with the city, which the latter has attempted to impair by a grant to another coporation, is sufficient to give jurisdiction to a Circuit Court of the United States of a suit to enjoin the latter corporation from interfering with the rights of the former, although both parties are corporations and citizens of the same state." *City Railway Co.* v. *Citizens' Street Railroad Company*, 166 U. S. 557.

The appellee here is asserting and claiming most confidently, and with the best of good faith, that it has a contract which exempts the shares of its capital stock from taxation by the City of Covington during its, the appellee's, corporate existence, to wit, until November 17, 1904, provided it continues to comply with the conditions of that contract, and it is admitted that it has done so up to the present; also, that the City of Covington cannot deny the existence or effect of such contract.

It is proper in this connection to say that while it has been held by the courts that contracts of other banks *similar* unto appellee's were revocable, and had been revoked, *it has never been decided that* appellee's contract was not in full force. Appellee was not a party to any contract with any other bank. Its was and is a separate contract between it and the State of Kentucky. Appellee was neither a party nor privy to any cause or decision wherein it has been held

that such contracts were revocable, and it has the right to and is now insisting that its contract is in full force and effect, and it is admitted in this case that it has fully complied with every provision of that contract up to the present, and it is contending, that such contract is now in full force, is *res judicata* as to appellants, and appellants are estopped to deny the existence of the contract under which appellee is entitled to the exemption claimed. Appellee is entitled to have decided the question as to the existence of this contract, as well as the other questions, and if it be in existence, then confessedly the act of the Kentucky legislature of March 21, 1900, is an impairment of the obligations of that contract, in violation of the Constitution of the United States.

In *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 383, the Circuit Court, Mr. Justice Harlan and Judges Taft and Lurton sitting, it was contended by Stone that the matter there presented, being *the same as one* of the causes made by the bill in the case at bar, was not of equitable jurisdiction in the courts of the United States, but the court, after full consideration, held that a case for determination in equity by that court was presented. That and several other cases growing out of and involving contracts made by banks with the state under the "Hewitt law," decided by the Circuit Court at the same time, were appealed to and decided by this court in the spring of 1899, and are reported in 174 U. S., and were all decided on their merits here, the court taking jurisdiction. (The cases will be cited in another part of this brief.)

In *Southern Railway Co.* v. *North Carolina Corp. Commission, etc.*, 97 Fed. Rep. 513, it was held:

> "A suit by a railroad company to restrain the authorities of a state from collecting a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and intended to impose on railroad property an undue share of the burdens of state taxation, is one which involves the construction and application of the pro-

visions of the Constitution of the United States prohibiting the taking of property without due process of law, and securing to all persons the equal protection of the laws, of which a federal court has jurisdiction, without regard to the citizenship of the parties."

In *Smyth* v. *Ames*, 169 U. S. 466, Mr. Justice Harlan delivering the opinion, it was held that if a case

> "in its essence be one cognizable in equity, the plaintiff (the required value being in dispute) may invoke the equity powers of the proper Circuit Court of the United States, whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction."

In the case at bar it is admitted that the amount of taxes for any one year, if appellant had the right to assess appellee's stock, would be much more than $2,000, exclusive of interest, penalties or cost.

The arrest of the president and cashier of appellee, which it is admitted was to be done by appellants unless they listed the shares of stock in appellee for taxation by appellant, would most assuredly cause the bank, its business and its shareholders most serious injury and damage, for which there was no adequate remedy at law. Appellants claimed the right to so have arrested, fined and proceeded against by process of contempt in the police court of appellant, under the general law governing cities of the second class in Kentucky, and especially provisions of Sec. 3179 Kentucky Statutes, providing:

> ". . . If any person refuse to attend when summoned, or to be sworn to answer, or to answer any question propounded to him by the assessor or his deputy, the assessor or deputy may, in writing, under oath, state the question, the refusal to answer it, and ask the police judge to issue a warrant against such person; and if the question appear to be a proper one, the said judge shall issue a warrant, and the said person shall, on conviction of having refused to answer the question, it being found by the court to be a proper one, be fined ten dollars, and there compelled

by process of contempt to answer the question and such proper questions as the assessor may propound to him. The assessor shall assess personal property in a separate book, in which he shall separate tangible from intangible property. The word person as used herein shall mean natural and artificial persons, and the duties enjoined on them shall, in the case of artificial persons, be performed by the chief officer or agent in the city at the time."

In addition, the act of March 21, 1900, under which appellants were proposing and are claiming the right to assess these shares of stock, is in violation of section 5219 of the Revised Statutes of the United States, and the jurisdictional amount being involved, it is a case arising under both the Constitution and laws of the United States, and by act of congress of August 13, 1888, the Circuit Court of the United States had original cognizance thereof concurrent with the state court. That act of March 21, 1900, would deprive appellee and its shareholders of its and their property without due process of law, deprive them of the equal protection of the laws; would take their property without just compensation in violation of the Constitution of the United States. The statutes of Kentucky *do not* provide, as appellants in their brief claim, for the recovery of illegal taxes paid under protest or compulsion, and they in no way provide a remedy at law for the protection of appellee's rights if it is allowed the city to assess these taxes. The cases decided by the Kentucky Court of Appeals, cited by appellants, do not sustain their position.

It is respectfully submitted that there can be no doubt of the jurisdiction of the Circuit Court to grant the injunctions in this cause applied for by appellee.

II.

Under the contract between appellee and the Commonwealth of Kentucky, it, the appellee bank, and its shares of stock, are not subject to taxation by the City of Covington before November 17, 1904; *and it having been adjudged in a suit between said City of Covington and the appellee bank that such contract existed, and the bank and its shares of stock were exempt from taxation by said city until November* 17, 1904, *appellant, City of Covington, and its officers are estopped to deny the existence of said contract or exemption.*

That appellee bank and its shares of stock are exempt from taxation by the City of Covington is res judicata.

Appellee filed with its bill herein as Exhibit "B" (Record, page 15) a complete transcript of the record from the Campbell Circuit Court in the case of appellee, The First National Bank of Covington, Ky., plaintiff, against the City of Covington, defendant (appellant), this being the case begun in the Kenton Circuit Court on November, 27, 1893, and transferred to the Campbell Circuit Court; and it filed with its amended bill of complaint, as Exhibit "X" (Record, page 33), a complete transcript of the orders, proceedings, judgment and mandate of the Court of Appeals of Kentucky in said cause, it being there on appeal as the *City of Covington, Appellant,* v. *The First National Bank of Covington, Ky., Appellee.*

The bank set out in full in its petition in that case the passage of the Hewitt law in 1886, and its provisions, its acceptance by the stockholders, and its notice to the Governor of its acceptance, and of the making of a contract by and between it and the Commonwealth of Kentucky, and its continued compliance with all the requirements of that contract, and the passage by the Legislature of Kentucky on November 11, 1892, of an act, in effect, repealing the Hewitt,

law, under which the contract was made, and providing for a different taxation of banks from that provided for in the Hewitt law, and the effect of which would be to subject the shares of stock in and property of the appellee here, plaintiff there, to taxation by the City of Covington, defendant there, and appellant here. Having shown that under the act of November 11, 1892, the City of Covington was claiming there was due and owing to it by the appellee $14.892.43 as tax for year 1893 on its franchise, the bank having paid its tax on its real estate to the city for that year, and threatening to distrain the property of the bank therefor, it in that petition claimed and alleged:

> "Plaintiff says that said act of the General Assembly of the Commonwealth of Kentucky of November 11, 1892, and all the other laws of the State of Kentucky which attempts to subject this plaintiff or its property to a different mode of taxation than that prescribed in said act of May 17, 1886, and *in said contract*, made and entered into by and between the said State of Kentucky and the plaintiff under and in accordance with said act of May 17, 1886, which contract has been faithfully kept and complied with by this plaintiff, or which in any way subjects this plaintiff or any of its property, other than its real estate and building, to taxation by the defendant, or authorizes or empowers the defendant to subject this plaintiff or any of its property other than its said real estate and building to the payment of any tax to the said defendant, the City of Covington, are an attempt on the part of the State of Kentucky to violate and impair the obligation of the contract entered into by and between said state and this plaintiff, as aforesaid, and are in violation of section ten of article one of the Constitution of the United States, prohibiting any state from passing any law impairing the obligation of contracts, and are in violation of section twenty, article thirteen, of the constitution of Kentucky in force when said act of May 17, 1886, was passed and

said contract was made, and of section nineteen of the present constitution of the State of Kentucky, which was in force when said act of November 11, 1892, was passed, and are therefore void." (Record, pp. 20–21.)

As stated, the Campbell Circuit Court upheld the contract as contended for by the bank, and perpetually enjoined the city from collecting the tax. (Record, p. 26.)

The case was heard and decided by the Court of Appeals of Kentucky with the cases of sixteen other banks, all going up on separate records from separate courts, *some* being *state* banks and *some national* banks, there being only one other from the Campbell Circuit Court, and in some instances the trial courts having adjudged an irrevocable contract, and in some in favor of the validity of the repeal, all being cases where the respective banks claimed to have entered into irrevocable contracts with the State of Kentucky under the "Hewitt act."

The Court of Appeals of Kentucky, on the 1st day of June, 1895, delivered its judgment and opinion on the appeal by the City of Covington from the judgment of the Campbell Circuit Court, affirming the judgment of the Campbell Circuit Court, the said opinion applying to the seventeen separate cases heard together. The Court of Appeals specifically, fully and clearly held, decided and adjudged that the contract entered into by and between the appellee and the appellant, City of Covington, was *an irrevocable contract during the corporate existence of appellee*, and that by reason thereof the shares of stock of this appellee were exempt from taxation by the appellant, City of Covington, during the corporate existence of appellee, and that neither the shares of stock, nor any of the property of appellee, other than its banking building, were liable for taxation by appellant, City of Covington, during the corporate existence of appellee. The opinion and judgment of the Court of Appeals of Kentucky, delivered through Chief Justice Pryor, is reported in 97 Kentucky, pages 599 to 620. (Record, pages 34 to 47.) The judgment and holding by the Court of Ap-

peals of Kentucky in that case between appellee and appellant, City of Covington, *has never been, in any way, modified or reversed, or set aside, or appealed from.* It was, and is, final and conclusive between the parties. The *specific thing heard, investigated, considered, decided and adjudged* by the Court of Appeals of Kentucky *was, and is, that the shares of stock of appellee*, bank, and all of its property, other than its banking building, *were exempt during its corporate existence from any taxation by the appellant*, City of Covington. There was and is nothing else whatsoever decided by the Court of Appeals of Kentucky in that case. There has been no other case in any court anywhere to which this bank was, in any way, directly or indirectly, a *party*, or to which it was in any way a *privy*, that in any way involved this question. The Court of Appeals, in its opinion in that case, reviewed the history of the legislation in Kentucky upon the subject of the taxation of banks and banking capital, the provisions of the former constitution of Kentucky, the present constitution established in 1891, the act of the legislature of 1892, which it was contended repealed the contract made under the Hewitt act of 1886, and reviewed very fully the provisions of the Hewitt act, which it stated in full at page 603, and the prior decisions by that court, and the arguments *pro and con* in favor of the repeal, and the authorities cited to sustain the various propositions, and at page 608 stated the matter in this way:

> "The question then arises: Did the reservation of the power to amend or repeal this article of the Hewitt law empower the legislature, or the framers of the constitution, to disregard *this contract* between the banks and the state?" (Record, bottom page 39.)

The court gave the reasons that operated upon the banks and the state respectively. The court, at pages 619, 620, held that:

> "The banks have all practically accepted the provisions of the Hewitt bill, and the legislation repealing or canceling the contract, being in violation of both the state and federal constitutions, leaves the Hewitt bill as to the banks in full force, and they

must be taxed under its provisions *until the contract terminates.*" (Record, page 46.)

Since and before this decision, the appellee has regularly each year, including the year 1900, paid the taxes as by said contract provided to the State of Kentucky, and the said state has received and held all the taxes so paid. During all the years that each share of appellee's stock of one hundred dollars, par value, has been paying to the state yearly seventy-five cents in tax, the regular rate of taxation imposed by the state has been only from $47\frac{1}{2}$ to $52\frac{1}{2}$ cents yearly. (Record, page 5.)

RES JUDICATA.

Literally, *res judicata* means things decided; in practice, a legal or equitable issue which has been decided by a court of competent jurisdiction. It is a general principle that such decision is binding and conclusive upon all other courts of concurrent power. This principle pervades not only our own but all other systems of jurisprudence, and has become a rule of universal law *founded on the soundest policy*. It is perfectly immaterial, to constitute *res judicata*, whether the decision or judgment was right or wrong. An erroneous judgment of a court, having jurisdiction both of the parties and of the subject-matter, is as binding and conclusive in every way as though the judgment had been right. To ascertain whether there is *res judicata*, the court will not, cannot, investigate or determine whether the judgment was right or wrong. It will only see whether the court had jurisdiction, and then ascertain what was actually decided. In other words, what was the thing decided. And it having been decided by a court of competent jurisdiction, no court will, in any other proceeding, review the correctness of the decision. The rule is: A decision makes white black; black, white; the crooked, straight; the straight, crooked. Chief-Justice Fuller, speaking for the Supreme Court in *Brownsville* v. *Loague*, 129 U. S. 493, says:

> "*Res judicata* may render straight that which is crooked, and black that which is white, *Facit ex curvo rectum, ex albo nigrum.*" *Jeter* v. *Hewitt*, 63 U. S., 22 How. 352.

The judgment of the Campbell Circuit Court and decision of the Court of Appeals of Kentucky were an adjudication that all the facts alleged in the petition were true, and it was a holding, final and conclusive, of all the mixed questions of fact and law, and of the questions of law, presented in favor of the bank, and in holding that there was such contract as claimed, and that such contract was irrevocable, the court necessarily held that the parties to the contract, to wit, State of Kentucky and the First National Bank of

Covington, Ky., the appellee herein, had the power to enter into that contract, that it was in no way *ultra vires*, that there was such agreement, that there was a good and sufficient consideration, and that the object and purposes of the contract when made were in all respects legal, valid and binding upon both parties to it. This is the necessary and logical result of the holding. If any fact to the contrary at that time existed or now exists, or if the court erred in its finding upon either the questions of fact, or mixed questions of fact and law, or upon the questions of law, the City of Covington is conclusively estopped to in any way so assert.

In *Forsyth* v. *Hammond*, 166 U. S. 517, a case where the eminent counsel on the respective sides are a guaranty that every possible argument was presented, and where we find this state of case presented: An effort was made in the State Court of Indiana to annex certain territory to the town of Hammond. In the proceedings taken to effectuate this purpose, Forsyth appeared to resist, and a judgment having been rendered annexing her land, she appealed to the Supreme Court of Indiana, where judgment was affirmed. Pending her appeal she filed her bill in the Circuit Court of the United States to enjoin the City of Hammond from annexing the territory. The bill was dismissed. The Circuit Court of Appeals reversed this judgment and directed a decree be entered enjoining the annexation. A *certiorari* was taken to the Supreme Court of the United States, where the judgment of the Circuit Court was affirmed and that of the Circuit Court of Appeals reversed. In passing upon the question of *res judicata*, Mr. Justice Brewer said:

> "She having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum. The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities

is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." *Cromwell* v. *Sac County*, 94 U. S. 351; *Mason Lumber Co.* v. *Butchel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent Dist.*, 144 U. S. 610; *Johnson Co.* v. *Wharton*, 152 U. S. 252; *Last Chance Mining Co.* v. *Tyler Min. Co.*, 157 U. S. 683.

In *City of New Orleans* v. *Citizens' Bank of Louisiana*, 167 U. S. 371, this question was unequivocally decided as appellee contends. I beg to present the review of that decision by the Circuit Court of the United States in *Bank of Kentucky* v. *Stone*, 88 Fed. Rep. 394. The court said:

"The second question in the case is that raised by the averment of former adjudication. The case of the *City of New Orleans* v. *Citizens' Bank of Louisiana*, 167 U. S. 371, 17 Sup. Ct. 905, it is impossible to distinguish from that before us upon the point of *res judicata*. The Citizens' Bank in New Orleans was exempted from taxation by an act of the legislature of Louisiana, of January 30, 1836. Extension of its charter was granted and accepted, and the question was mooted whether the exemption from taxation continued after extension. The bank brought suit in the District Court of New Orleans to enjoin the collection of a tax against it, on the ground that it had, by legislative contract, exemption from the same. The District Court sustained the claim and enjoined the collection of the tax. A second suit brought to enjoin another year's taxes resulted in a similar judgment. Some years later the City of New Orleans having attempted to collect a tax for a subsequent year, in violation of the exemption, the bank filed its bill in equity in the Circuit Court of the United States for the Eastern District of Louisiana, to enjoin the officers of the state and the city from proceeding to collect the tax, and set forth the former adjudica-

tion as a conclusive estoppel upon the defendants as to the point of previous litigation, namely, that there was a contract between the state and the bank forbidding such taxation. The causes of action were not the same in the case brought in the federal court and the cases adjudged in the state courts, because they involved taxes for different years; but the thing adjudged, to-wit, the existence and binding effect of the contract for the exemption for the particular taxation was the same. The Supreme Court of the United States in this case held that the City of New Orleans and the state taxing authorities were conclusively estopped by the judgments in the state courts from asserting any right to collect the tax in violation of the contract adjudged to exist in the prior litigation, and held that the contract having been thus established the bank was entitled to relief from a violation of that contract by any acts of the state officials acting under the authority of state legislation. It had theretofore been doubted in some courts whether a judgment in a suit for taxes could be held to be an estoppel against a state or any agency of the state for the collection of taxes in a suit for taxes subsequently accruing, but the question is now definitely settled. Mr. Justice White, in delivering the judgment of the court in a most elaborate opinion, said:

"'The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* cannot apply, whilst admitting in form the principle of the thing adjudged, in reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists even though there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies. This is the elemental rule, stated in the text-

books, and enforced by many decisions of this court. . . . It follows then that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.'"

In *Tioga Railroad* v. *Blossburg Railroad*, 20 Wallace, 142, it appears that the one railroad sued the other upon a contract of lease. There was a dispute as to the proper construction of this contract. The Supreme Court of New York construing the contract gave judgment according to that construction. A subsequent suit was brought for other sums due on the same contract, and again the question of its proper construction was raised. This time the suit was in the Circuit Court of the United States, and the plaintiff having again recovered judgment, the case was carried to the Supreme Court of the United States. Mr. Justice Bradley, delivering the opinion of the court, said:

"Some attempt has been made to show that in the suit brought in January, 1855, in the Supreme Court of New York, by the Blossburg Company against the Tioga Company on the contract now in question, the matter of the difference for which the present suit is brought was not a question decided; but we have looked at the record and proceedings therein, which were in evidence in this case, and are satisfied that it was decided. The report of the case in 1 Keyes, 486, shows that it was the only question before the Court of Appeals, to which court the case was carried. The point then is *res judicata* between the parties. It cannot be litigated again on the same contract."

In *Southern Minnesota Co.* v. *St. Paul Co.*, 55 Federal Reporter, 695, Judge Thayer, delivering the opinion for the Circuit Court of Appeals for the Eighth Circuit, says:

"The doctrine is well established that when an issue of fact, or a mixed question of law and fact, on which

> the decision of a case depends, has been tried and determined, the parties to such trial will be estopped, even in a second suit in a different cause of action, where the same issue or question arises, from contending to the contrary of what was thus found and determined. . . . The authorities furthermore show that the estoppel arising from a finding in previous suit between the same parties, is not confined to a finding upon a question purely of fact, or upon a mixed question of law and fact, but that it extends as well to a decision which determines the legal rights of the parties on a state of facts common to both suits, although the causes of action are different."

A leading case upon this question, and one which is cited very often, is that of *Cromwell* v. *County of Sac*, 95 U. S. 352. The Supreme Court, speaking through Mr. Justice Field, is there considering the difference between the plea of *res judicata* where the suit is between the same parties on the same cause of action and on a different cause of action. We make the following extract from the opinion:

> "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question *actually litigated and determined in the original action, not what might have been thus litigated and determined.* Only upon such matters is the judgment conclusive in another action."

These principles have been frequently applied by the Supreme Court and by the Circuit Courts and Circuit Courts of Appeals of the United States, as well as by the Supreme Courts of the various states, especially that of the State of Kentucky. Thus, in *Lumber Co.* v. *Buchtel*, 101 U. S. 638, there was an action upon a guaranty which contracted for

the payment of purchase-money in installments. To a suit for the first installment, the defendant, the guarantor, pleaded that it was induced to make the contract of guaranty by fraud; nevertheless, judgment was recovered. To the second action it set up the same defense, and also that a representation was made to it which amounted to a warranty. The court held that as to the first defense there could be no doubt that the first judgment was conclusive. That as to the second, the same is true, because in looking into the record the court ascertained that the findings of the referee upon which the first judgment was rendered showed that no representation at all had been made by the plaintiff to the defendant, and this finding having gone into the judgment was conclusive as to the facts found in all subsequent controversies between the parties to the contract.

The case of *Wilson's Ex'r* v. *Deen*, 121 U. S. 529, presents the converse to this case, and again the former judgment is held binding.

The case of *Nesbitt* v. *Riverside District*, 144 U. S. 619, presents the converse of the case of *Cromwell* v. *County of Sac*, and is decided by applying the same principle.

In *Johnson Co.* v. *Wharton*, 152 U. S. 256, the court applied the same principles, although the judgment in the first case was for so small amount that the Supreme Court had been without jurisdiction to hear it on the writ of error. The circumstance was held to make no difference.

The City of Covington did not answer in the case in the Campbell Circuit Court, but relied upon its demurrer to the petition. An inspection of the petition in that case will show that the terms of the contract are fully set forth in it. The court specifically held that there was such irrevocable contract between the plaintiff therein and the State of Kentucky, during this complainant's corporate existence. That being specifically held, and the court having granted the relief sought upon the specific ground of an irrevocable contract, the City of Covington is conclusively estopped from claiming that there is not such irrevocable contract.

In *Bissell* v. *Township of Spring Valley, Cherokee County, Kansas*, 124 U. S. 225, it was held:

"That a judgment rendered upon demurrer is equally as conclusive by way of estoppel of the facts confessed by the demurrer as a verdict finding the same facts would have been; and facts thus established can never afterwards be contested between the same parties or those in privity with them."

I do not quote extensively in this brief from the decision of the Court of Appeals of Kentucky, as the court will read it, but the court is bound to and will, under the law as adjudged, look into this record to ascertain for itself whether *in fact* the construction, the validity and the sanctity of the contract between the appellee and the State of Kentucky was litigated in that suit between the parties to this record, and in so looking it will ascertain that the Court of Appeals held that the matter in issue and decided was the effect of the Hewitt law and of compliance therewith by the bank herein; of its scope and true meaning, and of the protection it afforded to appellee and other banks in that litigation against taxation under the act of November 11, 1892, or any other constitutional or statutory enactment which, during the corporate existence of appellee, should endeavor to impose a local tax or a different mode or greater rate of taxation upon the litigating banks or shares of stock than was imposed by the terms of the contract made between the state and the banks under the authority of the Hewitt law.

It *was in no way whatsoever decided* that the appellee was exempt from, and entitled to, the injunction restraining the collection of the taxes claimed by the City of Covington in the year 1893, because it was a franchise tax. The attempted collection of that tax was the cause of the litigation; the defense of the bank and the thing adjudged was that the tax was illegal, not because it was a franchise tax upon a national bank, but that appellee had a contract which exempted it and its shares of stock from any taxation by the City of Covington. That was averred. That was the thing asked. That was the thing disputed. That was the thing heard. That was the thing considered. That was the thing

decided, fully, completely, and forever and finally, between this bank and the City of Covington.

The tax was not assailed because of any informality or defect in its assessment, or lack of power of the city to distrain. The decision of the Court of Appeals of Kentucky was in no way as to the *kind* or *character of the tax*, but was whether the shares of appellee's capital stock and property, other than its banking building, were, *under the contract*, *exempt* from taxation by the City of Covington during the corporate existence of appellee, the existence of the contract, whether the contract had been, or could be revoked without the consent of the bank, and after the city had its day in court, and a full hearing upon the question, the Court of Appeals of Kentucky decided that the appellee had such *irrevocable contract*. An examination of the synopsis of the arguments made by the respective counsel in the Court of Appeals, and published with the opinion, 97 Ky. 581 to 599, shows that the question *argued* to the court was as to the existence and irrevocability of the contract, granting exemption from municipal taxation.

The case in no way turned, or was decided, upon any illegality of the particular tax, but was whether the City of Covington could impose or collect *any* tax on the shares of stock or other property of the bank, other than its real estate, until after November 17, 1904. It might be illustrated by a proceeding to quash the levy of an execution, or to stop the sale of property under such levy. That could well be done without in any way attacking the validity or integrity of the judgment upon which the execution issued; for instance, the property might be exempt, or the levy irregular, but the effect would be only to release as to *that* levy, the execution could then be levied on other property, or a new *fi. fa.* might be sued out on the judgment. If, however, the attack on the levy was based upon the *invalidity* of the judgment and was sustained, the court holding that the judgment upon which the execution issued was invalid or void, then not only could there *be no other* levy of the *fi. fa.*, but *no new* one could be sued out. And so in the case at bar, the Court of Appeals of Kentucky did not hear, try or

decide as to any informality or illegality of the particular tax, but did as to the contract, which by its terms inhibited appellant from imposing any tax on these shares before November 17, 1904.

That the decision of the Court of Appeals of Kentucky, known as the Judge Pryor decision, rendered the first day of June, 1895, was and is *res judicata* of the question of the contract and of its irrevocability, as to all parties to that litigation, has been held by the Circuit Court of the United States for the district of Kentucky and by the Supreme Court of the United States.

The personnel of the Court of Appeals of Kentucky having changed somewhat, that court, on the 25th of March, 1897, in *another series* of bank cases presented to it wherein a *similar* question was involved as that in the Judge Pryor decision in 1895, *supra*, reached a different conclusion as to the revocability of the contract entered into under the Hewitt act. But this appellee was in no way a party to that later decision, nor was the appellant a party to that decision; and because the Court of Appeals decided a similar question differently from what it decided it in the litigation between these parties, in no way whatever affects the *res judicata* or thing decided in the controversy between the parties to this record. The Court of Appeals having rendered this later decision (known as the Judge Paynter decision), the question of the revocability of the contract and also as to the *res judicata* was presented to, considered and determined by the Circuit Court, composed of Justice Harlan and Circuit Judges Taft and Lurton, in the series of cases reported in 88 Federal Reporter, at pages 383, etc. The Circuit Court, in an elaborate opinion in case of *Bank of Kentucky* v. *Stone*, 88 Federal Reporter, 383, the complainant therein, Bank of Kentucky, being one of the banks, parties to the suits heard and decided by the Court of Appeals in June, 1895 (Pryor decision), held that such decision of the Court of Appeals of Kentucky, holding that there was such irrevocable contract, was and is *res judicata*, and that the parties to that litigation were estopped to assert that there was not such irrevocable contract. While the United States

Circuit Court held that the contract was not irrevocable and was a repealable one, and necessarily, therefore, that the Court of Appeals of Kentucky had decided the case erroneously, nevertheless it having been so decided it was binding and conclusive in all forums in all cases, and the parties to the record were estopped to deny the irrevocability of the contract, which the Court of Appeals of Kentucky had adjudged. Stone appealed from this decision to this court, and on the 15th of May, 1899, this court affirmed the decision of that court holding the *res judicata*. *Stone* v. *Bank of Kentucky*, 174 U. S. In the case of the *Northern Bank* v. *Stone*, 88 Federal Reporter, 413, the Circuit Court held that the decision of the Court of Appeals was *res judicata* as to Bourbon county, which was a party to the previous litigation, but was not *res judicata* as to the cities of Covington and Lexington, because they were not parties to the litigation wherein it was adjudged that there was this irrevocable contract, although that bank had branches in both cities. This case did not go the Supreme Court.

In *Farmers' Bank of Kentucky* v. *Stone*, 88 Federal Reporter, 987, the Circuit Court held that the Farmers' Bank in the prior litigation with the county of Franklin and cities of Frankfort and Henderson was conclusively adjudged to have an irrevocable contract under the Hewitt act exempting it from any taxation in excess of that provided therein. (This was the Chief-Justice Pryor decision in 97 Ky.) There was no such adjudication, however, between the Farmers' Bank and either Scott county or Henderson county, where it had branches, and their demurrers to the bill were sustained, and the bill dismissed as to them, while as to the other defendants the demurrers were overruled and the injunction granted. There we have a holding by the Circuit Court that all those who were parties to the Judge Pryor decision could never afterward question the existence of an irrevocable contract, which was *res judicata*, and acted as an estoppel as to them forever, and as to those counties, to wit, Scott and Henderson, that were not parties to that adjudication, the question was not *res judicata*, and the bank was bound to pay local taxes in those counties. The case came to the

Supreme Court of the United States, and was affirmed by this court in whole and in part, the court holding that the decree, so far as it granted relief against the defendants other than the county of Scott and city of Georgetown, should be affirmed upon the sole ground of *res judicata*. The court said that the city of Georgetown and county of Scott not having been parties or privies to the judgment pleaded as *res judicata*, it must be affirmed. *Stone* v. *Farmers' Bank of Kentucky*, 174 U. S. 409. This case clearly and conclusively illustrates the correctness of appellee's contention herein, that *res judicata* depends in no way upon the correctness of the decision. The decision establishing the irrevocable contract was wrong, but notwithstanding that fact, it is binding and conclusive upon all municipalities that were parties to that decision, and is not in any way binding or conclusive upon the municipalities that were not parties, although it was the same bank.

In the case of the *Louisville Banking Co.* v. *City of Louisville*, 88 Federal Reporter, 988, the court held that the decision of the Court of Appeals of Kentucky in 1895 was *res judicata*, and that judgment was affirmed by the Supreme Court of the United States. *City of Louisville* v. *Louis. Banking Co.*, 174 U. S.

These were all state banks that were parties to the decision of the Court of Appeals of Kentucky in 97 Ky., in the year 1895, and in each and every instance the Supreme Court affirmed the holding of the Circuit Court that that decision constituted *res judicata*, although it was the opinion of the court that the decision holding that there was an irrevocable contract was *wrong*.

In the case of the Third National Bank of Louisville, which was also one of the series of cases wherein the Court of Appeals of Kentucky held that there was such irrevocable contract, the Circuit Court held, 88 Federal Reporter, 990, that the question as to the existence of an irrevocable contract was *res judicata*, and, on appeal, this court affirmed the judgment of the court below, saying, 174 U. S. 435:

> "We need not, however, consider the question of *res judicata*, upon which the court below based its con-

clusion, as we have, in case No. 404, just announced, held entirely without reference to the plea of *res judicata* that taxes in form exactly like those here in question were illegal because levied upon the property and franchise of the bank, and not upon the shares of stock in the names of the shareholders. It follows, therefore, that the decree below which restrained the collection of the taxes was correct, and it is therefore affirmed."

That is, this court found that the judgment of the Circuit Court was right upon a ground other than the *res judicata*, and did not find it necessary to consider the question of *res judicata* in that case. In *every instance* where this court considered the effect of the Judge Pryor decision in 1895, it held that the question of an irrevocable contract was *res judicata* as to *the parties to that record*. The Court of Appeals of Kentucky having subsequently held that there was not an irrevocable contract under the Hewitt law, that it was repealable, and the Circuit Court of the United States having taken the same view, and the Supreme Court so holding, it follows of necessity that in the *State Bank* cases, in which a franchise tax would not be illegal, the Bank of Kentucky, the Farmers' Bank and others, that the Supreme Court of the United States would not have affirmed the judgment save and alone upon the ground of *res judicata*.

The Circuit Court, in deciding the case at bar, did not pass on the question of *res judicata*, nor as to whether the appellant is by the former decision estopped to deny the exemption of appellee's shares of stock from municipal taxation, deciding the case upon the other grounds which will be taken up later in this brief. Upon the question of *res judicata*, the court said (Record, p. 55):

"In this particular case, however, the views so far expressed may all become subordinate to the question most energetically urged, that, as to the complainant, the act of 1900 can have no operation before 1904, because up to that time it has an irrevocable contract with the state to the effect that its shares shall only be taxed according to the provisions of the Hewitt

law, and that this matter has been finally adjudicated by the courts of the state in the manner stated in the bill.

"The general doctrine as to the conclusive effect of judgments upon matters in controversy between the same parties or those in privity with them is certainly broad enough, as usually stated, to cover cases like this if there are no exceptions to it. The case of *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, goes far towards closing the question, and will do so unless its operation should be limited by considerations now to be stated. Of course, as to the claim for taxes for the year named in the suit described in the bill of complaint, the judgment is absolutely conclusive, although in the light of later decisions palpably erroneous. Should its effect be limited to the taxes for the year named in that suit, under the circumstances about to be stated, is an extremely interesting question. The judgment relied upon in the bill was certainly based upon the opinion that the Hewitt law and the complainant's acceptance of its provisions constituted an irrevocable agreement between the bank and the State of Kentucky that the former should not be taxed otherwise than pursuant to the Hewitt law for any purpose, but in terms it only embraced the taxes for the year 1893 and only enjoined their collection."

Reciting that the Court of Appeals of Kentucky in a later decision sustained the revocability of these contracts, and that this court in *Citizens' Saving Bank* v. *Owensboro*, 173 U. S. 636, had in the fullest manner sustained the last view taken by the Court of Appeals of Kentucky, the learned judge said (Record, pp. 56, 57):

"It is possible that it was with a purpose and desire to consider this phase of the question when it should come up that the Supreme Court, in the *Owensboro case*, 173 U. S., at page 648, so explicitly withheld an expression of its opinion as to whether the principle of *res judicata* would apply to the suits

for taxes claimed for future years in a case where there had been such a judgment as is here pleaded.

"It may be that the authorities, which are very strong, will not permit even such an exception to be grafted upon the general rule, and it may also be that I shall ultimately conclude that in any event it will be becoming, in view of the opinion in the case of *New Orleans* v. *Citizens' Bank*, 167 U. S., for this court to leave it to a higher tribunal to say whether there should be any limitations upon the general rule as to the conclusive effect of judgments as between the parties to the litigation; but, as the decision of the motion for a temporary injunction does not absolutely require a final expression on the question, I shall leave it open for further consideration."

No question of *res judicata* was, or could have been, considered in the *Owensboro case*, 172 U. S., *supra*, for no such question was in that case. That bank accepted the provisions of the "Hewitt act," and made the contract, but it was neither a party nor privy to the bank tax cases in 97 Ky., *supra*, where the irrevocability of the contracts was upheld, and there was no decision by any court that the bank had an irrevocable contract. It brought its action in the state Circuit Court alleging its contract, that Circuit Court decided adversely to it, and upon appeal to the Court of Appeals of Kentucky, that court held that the contract had been repealed, this being one of the banks parties in the Judge Paynter decision, 102 Ky. 174, decided March 24, 1897, so that no possible question of *res judicata* could or did arise in that case in this court, and it *being a state bank, it was subject to the franchise tax*, the matter then involved. What this court *decided* in that case was at page 655:

"Our conclusion being that there was no irrevocable contract protecting the bank from taxation, and, therefore, that the taxing law of Kentucky did not violate the contract clause of the Constitution of the United States, it follows that the decree below must be, and it is, affirmed."

This court, at page 648, did say:

> "It is not pretended that the bank, whose rights are here contested, was either a party or privy to the *Bank Tax Cases*. And even if such were the case, we must not be understood as intimating that the construction of the Hewitt act, which was announced in the *Bank Tax Cases*, would be binding in controversies as to other taxes between those who were parties or privies to those cases. On this subject we expressly abstain from now intimating an opinion. In determining whether, in any given case, a contract exists, protected from impairment by the Constitution of the United States, this court forms an independent judgment."

This was nothing more than making it plain that the court was not intimating an opinion on a question that was not before it in that case, especially as at the time other cases were pending before the court wherein the question was to be decided. That case was decided on April 3, 1899, and on the following 15th May, in case of *Farmers' Bank* v. *Stone*, 174 U. S. 410, *supra*, it was held by a divided court that the Pryor decision in bank tax cases, 97 Ky., *was binding* as to other taxes, on those who were parties or privies to that case, and such was the holding of the series of cases decided by this court and above referred to. In *no instance* did this court hold that as to those who were parties to that decision it was not *res judicata* as to taxes for other years, and in every instance held, it is true by a divided court, that the municipalities, parties to that decision, were estopped to deny that their adversary bank therein had a contract under which it and its shares of stock were exempt for future years from such municipal taxation.

The Legislature of Kentucky recognized that there was a complete estoppel by reason of the judgment as to the banks that were parties to the decision of the Court of Appeals of Kentucky in 1895 (Judge Pryor), and upon March 22, 1900, passed an act, being Chapter 28, Session Acts 1900 (page 88), as follows:

AN ACT TO REPEAL CERTAIN STATE BANK CHARTERS.

"*Whereas*, by virtue of a recent decision of the Supreme Court of the United States, all banks of this state, both state and national, are now required to pay state and local taxes in Kentucky, except the Bank of Kentucky, the Farmers' Bank of Kentucky, and the Deposit Bank of Frankfort, which three last named banks, by virtue of said decision, are now claiming exemption from all state and local taxes, except as provided in the Hewitt law, during their corporate existence; therefore,

"Sec. 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky:* That an act, entitled 'An act to establish the Bank of Kentucky,' approved February sixteenth, eighteen hundred and thirty-four, and all amendments and extensions thereof, also an act entitled 'An act to incorporate the Farmers' Bank of Kentucky,' approved February sixteenth, eighteen hundred and fifty, and all amendments and extensions thereof, also an act entitled 'An act to incorporate the Deposit Bank of Frankfort,' approved March third, eighteen hundred and sixty-three, and all amendments and extensions thereof, be, and the same are hereby, repealed. Provided, That if said banks, or either of them, on or before May first, nineteen hundred, file in Secretary of State's office their or its written consent to pay taxes under state and local levies of nineteen hundred and subsequent years, as provided in the constitution and revenue statutes of this state, the bank or banks thus agreeing shall be excepted from the operation of this act.

"Sec. 2. All acts and parts of acts in conflict herewith are hereby repealed.

"Sec. 3. *Whereas*, it is important that all banks of this state should be placed upon the same footing as to taxation without delay, an emergency exists, and this act shall take effect and be in force from and after its passage."

This was a distinct recognition by the legislature of Kentucky, in view of the decisions by this court, that the banks who were parties to the Court of Appeals decision in the bank tax cases, 97 Ky., were protected by reason of their contracts from any local taxation during their corporate existence, and that the question of such contract exemption was *res judicata*. By this act the legislature proceeded to repeal the charters of such state banks, providing that such repeal should not take effect as to such banks as would, by May 1 (following), 1900, file their *written* consent to "pay taxes under *state and local levies*."

The Court of Appeals of Kentucky quite recently has passed upon the effect of its decision, June 1, 1895, in the bank tax cases (Pryor decision), and in a way to leave no doubt that it holds it to be absolutely binding upon all the parties to it.

In *Thompson, Judge, etc.*, v. *Louisville Banking Co.*, and *Same* v. *Third National Bank of Louisville*, decided March 17, 1900, 21 Ky. Law Rep. 1611, Judge Hobson, delivering the opinion of the court, said:

> "These two appeals, involving the same question, have been heard together. On May 4, 1894, appellees filed in the court below their petition ordinary, alleging in substance that by virtue of the Hewitt act they were exempt from municipal taxation; that appellant as judge of the city court was about to proceed to fine them for not complying with a city ordinance, requiring them to pay municipal taxes; that the ordinance was void and that the judge of the city court had no authority to enforce it. They prayed a writ of prohibition prohibiting him from proceeding further in the matter. Appellant demurred to the petition, and on June 19, 1894, the demurrer was sustained on the ground that it did not set forth a cause of action, and appellees failing to plead further, the actions were dismissed. From this judgment they prayed and prosecuted an appeal to this court. On June 1, 1895, the judgment of the court below was reversed by this court and the cases remanded for

further proceedings consistent with the opinion. On April 13, 1897, the mandate and opinion were filed in the lower court, and thereupon a judgment was entered overruling the demurrer to the petition, and the appellant declining to plead further, on motion of the appellees, it was adjudged that the prayer of the petition be granted and appellant prohibited from proceeding further with the prosecution referred to. From this judgment appellant has prosecuted these appeals. The grounds of reversal relied on by the learned counsel for the city are as follows:

"*First.* Prior to the rendition of the judgments appealed from, on April 13, 1897, by the court below, this court had in certain other actions, on March 24, 1897, overruled its former decision in these cases.

"*Second.* Section 163 of the act for the government of cities of the first class, under which these actions were brought, is unconstitutional and void.

"*Third.* The Louisville city court had jurisdiction of the subject-matter independently of the ordinance referred to, and if the ordinance was unconstitutional the remedy was by appeal and not by writ of prohibition.

"None of these grounds seem to us available. The *opinion rendered in these cases is the law of the cases, however erroneous it may have been.* The fact that it was overruled in a subsequent case between other parties destroys it as a precedent in other cases; but it is nevertheless binding on the parties to this controversy. *The rule is elementary that a matter once litigated and determined finally cannot be relitigated between the same parties.* When these cases were returned to the court below that court had no alternative but to obey the mandate of this court, and upon appeal from that judgment this court is as much bound by that mandate as the court below was. If this were not so litigation would be interminable, and a judgment of this court finally settling the rights of the parties would be only the starting point for new

litigation. (*Legrand* v. *Baker*, 6 Monroe, 243; *Copely* v. *Copely*, 2 Ky. Law Rep. 437; *Lewis* v. *Lewis*, 9 Ky. Law Rep. 413.)

"If the statute under which the actions were brought was unconstitutional, or if prohibition was not the proper remedy, the petition stated no cause of action, and the demurrer thereto was properly sustained. *The judgment of this court holding the petitions good necessarily concluded both these matters.* It is *immaterial whether they were argued on that appeal or considered by the court.* They were necessarily involved and the rule is well settled that the plea of *res adjudicata* applies not only to the points which the court actually decided, but to every point that was presented by the record and necessarily involved in the decision of the case. (*Davis* v. *McCorkill*, 14 Bush, 746; *Williams* v. *Rogers*, 14 Bush, 781; *Smith* v. *Branin*, 79 Ky. 119; *Francis* v. *Wood*, 81 Ky. 16.)

"Judgment affirmed."

In this case the Court of Appeals followed what has long been the universal rule in Kentucky as to prior decisions.

In *Davis, etc.*, v. *McCorkle*, 14 Bush (Ky.), at page 754, the court held:

"The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

And in *Williams* v. *Rogers*, 14 Bush, at page 781, the court said:

"As this matter was necessarily passed upon on the first appeal, although not adverted to in the opinion, appellant is precluded from again raising the question."

Also, in the case of *Francis* v. *Wood*, 81 Ky., at page 22, the court said:

"The plea of *res adjudicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward."

As a case wherein this doctrine of *res judicata*, and estoppel that grows out of it, is fully reviewed and authorities thereon collected, I beg to present the very recent case of *Hardwicke, etc.*, v. *Young*, decided by the Court of Appeals of Kentucky, April 16, 1901, 22 Ky. Law Rep. 1906. For convenience, the full opinion is quoted, and is:

"OPINION OF COURT BY JUDGE DU RELLE.

"The appellee brought a suit against appellants to restrain the collection of school taxes for District No. 50, of Nicholas county, upon the alleged ground that his property was not taxable in that district, but in District No. 28, of Bourbon county. On appeal to this court, it was decided, in an opinion by Judge Paynter (20 Ky. Law Rep. 1191), that a judgment in his favor should be reversed and his petition dismissed.

"Appellee thereupon brought another suit against the trustees to enjoin the collection of the same taxes, the ground alleged being that the law under which the taxes were imposed was in violation of section 157 of the constitution, for want of the assent of two-thirds of the voters of the district, voting at an election for the purpose. The trustees pleaded the former judgment in bar of the action, and a demurrer to the answer was sustained.

"Appellee admits that the relief sought in the former suit is identical with that sought in this, but insists that the only fact involved or litigated in the former case was, whether appellee's residence was in one district or the other, and that the validity of the tax levy and the constitutionality of the act under

which it was made were not directly or indirectly involved in the former suit. His contention is, that there are two causes of action, either of which would entitle him to the relief which was sought—one, that his property was not in the tax district; the other, that the law under which the tax was levied was unconstitutional.

"If his contention is correct, it is evident that he might litigate in a separate suit every individual ground of objection to the tax. And so we might have a succession of litigations to determine the constitutionality of the act, the situation of the property to be taxed, the validity of the tax levy, exemptions from taxation under exceptions in the act, and matters in avoidance, such as payment or compromise. What is the cause of action in this proceeding? When a collection of tax is sought to be enjoined, it is manifest that the usual procedure is reversed, the party who, in ordinary proceedings, would be plaintiff, asserting his right, becoming defendant, and the party who, in ordinary proceedings, would be a defendant, relying upon his defense, becoming the plaintiff. In such a proceeding the matter relied upon in the petition is defensive. In this proceeding it is matter which is supposed to be defensive to a liability to taxation. The matter which is litigated is liability to taxation. The object of the litigation was not to determine where his property was situated, but to determine the question that it was not liable to the tax. If we go the other way about to ascertain what was the controversy, the case is freed from much of its difficulty. If this had been a tax suit authorized by law for the recovery of the tax, there can be no question that the defendant would be required to set up all available matters of defense, or be barred from asserting them in any future proceeding. There is no question here of matters which may be called *quasi* defensive, such as set-off and counterclaim, upon which the authorties are not altogether in harmony.

"In section 349 of Freeman on Judgments, cited by appellee, it is said: 'An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided, as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense.'

"In *Cromwell* v. *County of Sac*, 94 U. S. 351, also cited by appellee, Judge Field, discussing the doctrine of *res judicata*, said: 'In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. . . .'

"So, in *Bean* v. *Meguiar, Helm & Co.*, 20 Ky. Law Rep. 886, it was said: 'The opinion upon the former appeal is decisive of the rights of the parties to this appeal upon all questions involving the validity of that judgment, as on a second appeal the court will not go behind the first decision and decide a question which was or could have been raised on the first appeal, unless the question were one that was expressly left open for future litigation.' (*Hapworth* v. *Thomp-*

son, 3 Ky. Law Rep. 254; *Burns* v. *Stephenson*, 3 Ky. Law Rep. 754.)

"In *Burnett* v. *Commonwealth*, 21 Ky. Law Rep. 695, this court said: 'The rule is well settled that a judgment is conclusive, not only as to all matters which are in fact litigated, but also as to all others which the parties might have presented, and should have been presented, and that a litigant cannot present part of his cause of action, and if beaten on that, rely on the balance.'

"So, in *Francis* v. *Wood*, 81 Ky. 22, it was said: 'The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward. They cannot open the litigation in respect of matters which might have been brought forward, only because, by negligence or inadvertence, they have omitted from their case.'

"And in *Davis* v. *McCorkle*, 14 Bush, 746, it was said: 'A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction.'

"In Bigelow on Estoppel (5th edition, page 86), after stating the general doctrine of *res judicata* with reference to the effect of a former judgment *in personam*, it is said: 'It will be seen that the fact that the form of action and precise remedy sought are different in the two suits will not prevent the existence of an estoppel. The estoppel grows out of matter of substance, and form has little, if anything, to do with it. This is believed to be true at the present time even in regard to matters of pleadings, according to more widely prevailing modes. After what has been said, it need hardly be added that, where the court had jurisdiction and the judgment was not

"concocted" in fraud, it is entirely conclusive upon the parties, and cannot be impeached in any collateral action either because, *e. g.*, the law was incorrectly applied to the case, or because some statute under which the proceedings were taken, as, *e. g.*, an insolvency statute, was unconstitutional, or because the facts before the court were incorrectly found, or because the facts were not all known at the time.'

"A number of cases are cited in support of this doctrine. In all of them the doctrine laid down in the text is recognized, though in some of them the courts refuse to apply the doctrine, because citizens of one state were held not to have become parties to insolvency proceedings under the laws of another state in the absence of citation or appearance. In *Folger* v. *Clark*, 80 Me. 240, a creditor whose debt accrued before the passage of the insolvent law, having proved his debt against the estate and received dividends, sought to recover the balance of the debt on the ground that the law, as to his claim, was unconstitutional. The question was whether he was estopped by these facts from asserting such unconstitutionality. It was held that he was estopped. Said the court: 'In *Lee* v. *Tillotson*, 24 Wend. 337, it was held that a party having waived a constitutional provision cannot subsequently ask for its protection. "A contrary argument," says Cowen, "would deprive a criminal of the power to plead guilty, on the ground that the constitution has secured him a trial by jury." In *Daniels* v. *Tearney*, 102 U. S. 426, the court says: 'It is well settled as a general proposition, subject to exceptions, that when a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense.' The case at bar is stronger than that. It is a case of judicial estoppel, or an estoppel by judicial proceedings. Mr. Cooley after enumerating the classes of cases where for different causes the insolvent law is not allowed to apply, says:

'if, however, the creditor in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the constitution from the reach of the law' (Cool. Con. Lim. (5th edition) 358; Whar. Conf. Laws, section 528).

"Again, on page 152, Mr. Bigelow says: 'A judgment is conclusive by way of estoppel of facts (necessary facts in a chain as well as the primary facts in issue), and none other, without the existence and proof or admission of which it could not have been rendered. The judgment determines all questions that ought to have been presented.'

"After a careful examination of the authorities we have reached the conclusion that the subject-matter of the litigation was appellee's liability to the tax. He undertook, in a proceeding to restrain its collection, to set up his defense against the claim. It was his duty to assert all matters which were strictly defensive. Having failed to do so, he cannot now, in a subsequent suit, be allowed to assert defenses which he neglected or overlooked in the former litigation. He cannot cut and come again. There must be somewhere an end to the litigation of liabilities which have been judicially determined.

"For the reasons given the judgment is reversed, with directions to dismiss appellee's petition."

This opinion was followed in a few days, on April 17, 1901, by another by the Court of Appeals of Kentucky in *Arnold* v. *Commonwealth*, 23 Ky. Law Rep., page 182, in which the court, through Judge Hobson, held:

"This is the second appeal of this case. The facts of the case are fully stated in the opinion rendered on the former appeal (*Arnold* v. *Commonwealth*, 21 Ky. Law Rep. 1566). On the return of the case to the lower court another trial was had, resulting in a verdict and judgment convicting the appellant of murder, and fixing his punishment at confinement in

the penitentiary for life. It is earnestly insisted by his learned counsel that the indictment is insufficient and that the demurrer to it should have been sustained. It is too late to make this objection, which was passed by on the first appeal. The opinion then delivered is conclusive of all matters actually decided or presented by the record, and which should have been decided. The court on that appeal reversed the judgment for error in the instructions given to the jury and remanded the case for a new trial. This was in effect to hold the indictment good (*Thompson* v. *First National Bank*, 21 Ky. Law Rep. 1611, and cases cited)."

From these decisions by the Court of Appeals of Kentucky, it is manifest that counsel for appellant have misread the cases which they cite from that court, as indicating a different rule as to estoppel by *res judicata*, from that contended for by appellee in this cause. A brief review of the authorities cited by appellant will so show.

In *City of Newport* v. *Masonic Temple Association*, 103 Ky. 592, decided May, 1898, the facts were: The association was chartered by the legislature of Kentucky on March 29, 1880, and the charter contained a provision: "That all property of said company devoted to Masonic or charitable purposes shall be exempt from all taxation." There was nothing whatsoever in the charter preventing a subsequent legislature from amending or repealing it. That charter was held by the court to be in every respect subject to what is known in Kentucky as the act of 1856, as follows:

> "That all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein expressed; provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

It appeared that the association had a portion of its building rented for $1,700.00 per annum. There was no

question that this charter exemption was good under the constitution in force in Kentucky at the time of its passage. The new constitution took effect September 28, 1891. In 1892, the City of Newport sued the Masonic Temple Association for taxes on its four-story brick building for years 1887, 1888, 1889, 1890 and first half of year 1891. The company pleaded its charter exemption, which was in force during the time of these claimed taxes, and was not repealed until September, 1891, by the adoption of the new constitution. The court sustained a demurrer to the petition and dismissed it, holding the charter exemption good for those years. Subsequently the city sued for taxes for 1891, 1892 and 1893, and the Masonic Temple Association pleaded the former decision as *res judicata*, and this is the case that appellant cites as authority. The Court of Appeals held that there was no question of *res judicata*, as the first decision was merely that the existing *charter exempted* the association from tax, while the case there presented was for taxes after the charter exemption had *confessedly* been repealed, and there was and could be no question as to the right to repeal. The Court of Appeals said:

> "If we should hold that the judgment in the former case was a bar to a recovery in this case, we would in effect hold that neither the legislature nor a constitutional convention could alter or amend a law or charter, because a court had adjudged the rights of the parties thereunder. If we did this, then we would be holding that a question was adjudged which *was not in issue in the former case, and one that could not have been raised in it.* In the former case, the matter for adjudication arose under the provisions of the charter, and the question for adjudication in this case arises under the amended and altered charter."

In the *City of Newport, etc.*, v. *Commonwealth*, 21 Ky. Law Rep. 42, there was no question whatsoever of contract or exemption by charter. In that case, the decision relied on as constituting *res judicata*, there had been no controverted *fact* or *issue* ascertained or adjudged. The thing decided by the

court in that case was, that in a subsequent case the court was not bound by its decision of law in a former case.

In *Louisville Bridge Co.* v. *City of Louisville*, 22 Ky. Law Rep. 703, a former decision "based largely, and in fact almost entirely, upon the idea that appellant's (bridge company's) property was situated beyond the population of the city, and enjoyed neither actual nor presumed benefits from its municipal government, and it was exempted from taxation upon the same theory that agricultural lands situated within the corporate limits of municipalities were exempted in the case of *Southgate* v. *City of Covington*," was held not to be *res judicata*, when conditions had altogether changed, and the new constitution had prescribed a new rule of taxation. And the court held that the bridge company was exempt from taxation by the City of Louisville until the adoption of the constitution in 1891, not upon any ground of *res judicata*, as there could be no such question in that case, but the court would follow its former rule of construction and apply it to the years preceding the specific requirement of the constitution.

Appellant's counsel are altogether mistaken in citing *South Ottowa* v. *Perkins*, 94 U. S. 247, as an authority in support of their position. In that case, this court neither considered nor decided a question in any way similar to that presented in the case at bar. The proposition argued in that case was: Although an act was not duly passed by the legislature of Illinois, the town, having issued bonds under the act, was estopped from denying its passage. This court, speaking through Mr. Justice Bradley, held:

> "We cannot assent to this view. There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a state is a law, or is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow;

> a law in one place and not a law in another in the same state. And whether it be a law or not a law is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissible in the case. It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that state is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise."

In *Owensboro National Bank* v. *Owensboro*, 173 U. S. 665, *it was not decided*, nor can any such inference be drawn from that decision, that the contract under the Hewitt act was either illegal or void as to national banks, or as to them *ultra vires*. Such has never been decided by any court. That is not now a question for investigation, but if it was the court would not decide the contract to be *ultra vires*. Under that act the shares of stock were taxed while *what* this court held in the Owenboro case to be *invalid* was a *franchise* tax.

Applying the rule as laid down by the textwriters, held by this court and the Court of Appeals of Kentucky, as well as other courts of last resort, it is most earnestly submitted the question as to the exemption of the shares of stock in appellee, during its corporate existence or until November 17, 1904, from taxation by the City of Covington, was presented in the suit between it and the City of Covington, was fully argued to, considered and decided by the Court of Appeals of Kentucky in favor of such exemption; and the question has ever since been, and now is, *res judicata*, and the City of Covington, the party to that suit, is conclusively estopped to contend otherwise.

III.

The act of March 21, 1900, impairs the obligation of a contract, undertakes to take the property of appellee and its shareholders without due process of law and without just compensation, and denies to it the equal protection of the laws, is repugnant to the laws of the United States, and is retroactive and violative of rights acquired under the law, as held and declared to be.

Act of March 21, 1900, *invalid.*

The act of March 21, 1900, is clearly illegal and void, in that it is retroactive, and it is an attempted discrimination against the appellee and other national banks located in the State of Kentucky.

Section 2 of that act provides for the listing by the president or cashier of the bank of its shares of stock, and then provides that *the bank* shall *be* and *remain liable* to the state, county, city, town and district for the taxes upon said shares of stock.

Section 3 provides that when the shares of stock in national banks have not been listed for taxation under levy or levies of any year or years since the adoption of the revenue law of 1892, that these shares of stock shall be listed for taxation under said levy or levies; and then undertakes to provide that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of 1892, said bank shall be excepted from the operation of this section as to said year or years; and also where any national bank has paid for any of these years state taxes under the Hewitt law in excess of the state taxes required by this act for the same year or years, the bank shall be entitled to credit by said excess upon the state taxes required by this act.

Here we have an attempt to make the *bank liable* for

taxes upon its shares of stock for *the preceding seven years.* And, as it appears in the case at bar, where the stock has changed hands repeatedly, and where the capital stock of complainant was $600,000 up to the 1st day of July, 1897, since which time it has been only $300,000; that is, the capital stock of the bank was reduced one-half at that time. But, notwithstanding this, the proposition is that the city shall go back and collect from the bank taxes upon its shares of stock that are not, and have not been, in existence since the 1st day July, 1897, although there was paid to the state every year seventy-five cents upon each of its shares of stock. The protection proposed by the act being that the bank shall receive a credit from the state for the taxes that it has paid heretofore. What protection is this? The bank might discontinue this year or next year. Indeed, in the case of this bank, it having a capital stock now of only $300,000, and having paid for five years on $600,000 under the Hewitt law, and since then paid regularly upon $300,000, the excess that it has so paid would be more revenue than the state would be entitled to receive from it at the present rate of state taxation, during the balance of the corporate existence of the bank.

It is shown (Record, page 5) that the rate of taxation by the state, beginning with 1886, has at no time been greater than 52½ cents on the $100, and during several years only 42½ cents. Here is the excess the bank has paid:

Year.	*Rate.*	*Excess.*	*Capital Stock.*	*Amt. Excess.*
1893	47½	27½	$600,000	$1,650 00
1894	42½	32½	600,000	1,950 00
1895	42½	32½	600,000	1,950 00
1896	42½	32½	600,000	1,950 00
1897	52½	22½	600,000	1,350 00
1898	52½	22½	300,000	675 00
1899	52½	22½	300,000	675 00
1900	47½	27½	300,000	825 00
				$11,025 00

That is, the bank has paid to the state during the years 1893 to 1900 the sum of $11,025.00 in excess of what it would have had to pay, paying the rate that property generally paid during those years, and the act proposes to give to the bank credit for this excess on future payments. Even if the bank continues to exist until the end fixed in its charter, November, 1904, the tax going to the state at the present rate of 47½ would be only about *one-half* of this sum.

The act is retroactive. The state has taxed this bank, under the contract, almost double what was the rate as to property generally, has received its taxes from the bank, held it, and still holds it, and, as the bill shows, collected its tax under the contract for the year 1900, after the adoption of this act of March 21, 1900 (it has also collected it for the year 1901), showing conclusively that the state itself recognizes that, so far as this appellee is concerned, it is not in any way subject to this act. Yet, it is proposed under the authority of the state to exact local taxes upon the shares of stock of the appellee for years that have elapsed, as well as for those that are to come, during its corporate existence.

A tax upon the shares of stock is not a tax against the bank. Should the bank fail to pay and become insolvent, then the state, or the municipality wherein the bank is located, may pursue the stockholder into another state, and in another jurisdiction collect from the stockholder taxes levied against shares of stock in his name that were not paid by the bank.

According to the general revenue law of Kentucky, state banks are still being assessed on their franchise under the revenue law of 1892, and this is the only mode provided for the assessment of state banks generally.

The legislature, in 1898, by an amendment approved March 19, 1898 (Session Acts, 1898, page 96), conferred upon cities of the first and second class in the State of Kentucky the power to assess the franchise of all banks, state and national, for taxation by said cities. That is, that act conferred upon such cities the power of assessment given by the revenue law of 1892 to the state board of valuation and assessment; and the legislature, b[illegible] act which be-

came a law upon March 23, 1900, without the signature of the governor, amended this act of 1898, by which it has undertaken to provide for the assessment for taxation by cities of the first, second and third classes, of the shares of stock of every incorporated bank, trust company, etc., located in such cities. That is an attempted provision for the assessment of the shares of stock in banks located in any of these three classes of cities, when there is no such provision for the assessment of the shares of stock of any state bank located anywhere in the State of Kentucky, outside of any of these three classes of cities. The declared purpose of this act of March 21, 1900, as appears from the sixth section thereof, was to place national and state banks upon the same footing as nearly as may be consistently with said article 3 of the act of 1892. This does not place national banks upon the same footing as state banks. The way for the legislature to have done so would have been to provide for the assessment of the shares of stock of all state banks in the state, no matter where located, as well as the shares of stock of national banks.

The shares of stock of the bank are to be assessed. Some of the shares of stock of this bank have gone out of existence; in many instances the stock has changed hands. Suppose this assessment should be made for the years 1893 to 1900; it would be against the shares of stock, and the act undertakes to make the bank liable for it. Who would pay the tax? Could it be taken out of the money on hand that belongs to its present stockholders? Is it a burden that follows the stock? Did the persons who bought the stock in the meantime take it *cum onere?* Did they take it with any legal liability attaching that the city might undertake to impose for these seven years. The act makes the bank liable for the tax. If a person who owned stock at any time during these years, and sold it, and has in the meantime become insolvent, from whom and how can the bank reimburse itself? If the owner of stock during any part of this period has disposed of it, and moved to any other jurisdiction, can the bank be made to pay the tax upon his stock and pursue such owner to that jurisdiction, and, after it had done so,

could it enforce the collection of the taxes from him? This presents a condition of affairs for which the appellee bank, nor any of its shareholders, are in any way responsible. It grows out of the act of the State of Kentucky and the decision by its court of last resort.

Under section 5219 of the Revised Statutes of the United states, all the shares in a national bank "may be included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the state within which such association is located."

While a tax may thus be by the authority of the state imposed upon the shares of stock, it is against the shareholders and not against the bank, but the bank may be compelled to pay the tax thus levied on the shares. *First National Bank* v. *Commonwealth*, 9 Wallace, 353. The bank, however, is not absolutely liable for the tax on its shares; to render it liable, it must be shown to have, or have had at the time the tax was due, dividends belonging to the shareholders. *Farmers and Traders' National Bank* v. *Roffman*, 93 Iowa, 191.

It stands admitted that the appellee "*hath* regularly during each and every of said years semiannually paid to its *then* shareholders its current earnings and profits by way of dividends." (Record, p. 31.) That is, it paid the full taxes under the contract each year to the state, and then paid to the shareholders the net earnings by way of dividends.

Upon the 14th of December, 1900, the Court of Appeals of Kentucky, in the case of *Scobee, Sheriff, etc.*, v. *Bean, etc.*, 22 Ky. Law Rep. 1076, for the first time held that, under the general revenue law in Kentucky, shares of stock in national banks were assessable by the county assessor (for state purposes) in the hands of the shareholders, holding:

> "Such shares are subject to taxation in the *hands* of *the owners* under the provisions of sections 4050 and 4058, Kentucky Statutes, under the head of miscellany."

This decision in no way affects the questions here made.

Even if there was no question of *res judicata*, and the act of March 21, 1900, confessedly valid, yet the appellee and its shares of stock could not be assessed for taxation by the City of Covington for any time prior to the passage of that act. The settled law of Kentucky is, as declared by the Court of Appeals of that state in *Franklin County Court* v. *Louisville & Nashville R. R. Co.*, 84 Ky. 59:

> "Where there has been a failure to list property for taxation because of the decision of the court of last resort in the state that such property was not subject to taxation, the fact that the court subsequently decides that the law was misinterpreted will not authorize the collection of taxes on the property for the period during which the law as announced and understood did not require such property to be listed for taxation.
>
> "The Court of Appeals of Kentucky decided in 1868 that a portion of a railroad in a county was not a part of the county property as to county taxation, but was an entirety, and liable in its consolidated character for state revenue only. This case was followed by another to the same effect, and the law remained as declared by the Court of Appeals until 1876. So much of appellee's road as is in Franklin county was not assessed for county taxes for the years 1868 to 1875, inclusive, and the county now seeks to collect taxes thereon for those years. *Held*, that while the court is of opinion that the law was misinterpreted, yet, as appellee complied fully with the existing law, as interpreted by the highest tribunal in the state, no more should be required of it."

The court in that case, at pages 64, 65, said:

> "From 1868 to 1875, inclusive, it was, however, the law, as declared by this court, that the road of the appellee was not taxable for county purposes. There was no express statutory provision to the contrary. Rights were acquired and duties performed in accordance with the then law as announced and understood,

and in the absence of an express statute to the contrary, the then construction of the law must yet be held to be *the* law governing the acquisition of rights, or the performance of duties of that period.

"It is well settled that if a contract be valid under the law as previously expounded by the courts, and as understood at the time, no subsequent judicial action will render it invalid. Parties have the right to and do contract with a view to the then law as declared. (*Olcott* v. *The Supervisors*, 16 Wall. 678.)

"It is equally just that the same rule should apply as to duties required of them, such as the listing of their property for or the payment of taxation. Otherwise, they would not know when or how to act safely as to investment; and it would introduce much uncertainty and mischief into the business of the country. If they comply fully with the existing law, whether it be in *the form of positive legislative enactment or judicial interpretation, no more should be required of them.*"

This case was quoted with approval by the court in *Commonwealth for, etc.*, v. *L. & N. R. R.*, 89 Ky. 139.

Applying the law, as thus declared by the court of last resort in Kentucky, to the facts in the case at bar, there can be no assessment of the shares of appellee's capital stock until after the passage of the act of March 21, ~~1896~~ 1900

The Court of Appeals of Kentucky, in June, 1895, decided appellee not liable for taxation by appellant, and with that knowledge, no act was passed by the legislature until March, 1900. It is true that in 1897 the Court of Appeals held contracts similar to appellee's not to exempt those particular banks, but it could well be said that, as these cases involved questions under the Constitution of the United States, there was no final decision therein until May, 1899, and not *until then* was the decision of June, 1895, by the Court of Appeals of Kentucky, finally overruled, and not until then, when this court had spoken, was it finally determined whether, under the Constitution of the United States, the

contracts made under the Hewitt law in 1886 could be revoked by the state. As so clearly stated by the Court of Appeals in that case, 84 Ky., page 65:

> "Rights were acquired, duties performed in accordance with the *then law as announced and understood*, and in the *absence of an express statute to the contrary*, the *then* construction of the law must yet be held to be *the* law governing the acquisition of rights or the performance of duties of that period."

The record in this case shows the full compliance by appellee with all the requirements of it, as *expressly* held by the Court of Appeals of Kentucky, and it shows the reduction of stock, payment of dividends, sale of shares, etc., during the time when it surely had the right to say that it was in every respect acting entirely within, and in accordance with, the law as declared to be.

The act of March 21, 1900, discriminates against national banks. By its very title, it is confined to national banks, and proposes to go back and tax their shares wherever the bank may be located in the state, when there is nowhere in the law of Kentucky any statute taxing *shares* in state banks, or the state banks themselves wherever located in the state. The attempted assessment and collection of taxes by the appellant upon the shares of stock of the appellee, either for the past years or subsequent ones until the expiration of its contract, November 17, 1904, is an impairment of the obligations of that contract, and a taking of property without due process of law, and a taking of private property for public use without just compensation; and to enforce said act of March 21, 1900, against the appellee herein would be an abridgment of its privileges and immunities, and a denial to it of the equal protection of the laws. It is most respectfully submitted that the judgment appealed from should be affirmed, and that it should be adjudged that the shares of the capital stock of appellee and its property, other than its banking building, are by reason of its contract under the Hewitt act of 1887 exempt from taxation by the City of Covington until November 17, 1904, the bank in the mean-

time complying with the conditions of that contract, and that the City of Covington is estopped by reason of the judgment by the Court of Appeals of Kentucky in its suit with appellee to deny the existence of such contract, and that it is *res judicata*, and that the act of March 21, 1900, is as to appellee void and invalid, and contrary to the statutes of the United States.

Respectfully submitted,

JAMES W. BRYAN,

Solicitor for Appellee.

COVINGTON, KY., *January* 11, 1902.

APPENDIX.

Article II, Chap. 92, General Statutes (Ky.) Ed. 1887, Hewitt Law.

Stocks.

Section 1. That shares of stock in state and national banks, and other institutions of loan and discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies, and said banks, institutions and corporations shall, in addition, pay upon each one hundred dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, state, county and municipal.(a) For the purpose of ascertainng such surplus, undivided profits or undivided accumulations, the auditor may, at his option, investigate the books of such bank, institution or corporation; and any officer having in charge the affairs of such bank, institution or corporation who shall refuse, when duly called upon for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin Circuit Court, or the Circuit Court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars. The Commonwealth may, in the county wherein said bank, institution or corporation is located, institute an action in any

Auditor may investigate books.

court having civil common law jurisdiction of the amount involved for the recovery of the fine.

Corporations to report and pay tax.

SECTION 2. The cashier of a bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, the true amount of surplus, undivided profits or undivided accumulations, and how or in what said surplus, undivided profits or undivided accumulations is invested, and to pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent upon the amount, and any state bank, institution or corporation shall thereby forfeit the privilege of its charter. The officer making the report shall attach thereto the following affidavit, to which he shall make oath before some officer authorized to administer oaths: "I —— swear (or affirm) that I am the —— of ——, and that I have in the foregoing report truly and accurately reported the amount of the capital stock, the amount of the surplus, the undivided profits or undivided accumulations of said ——, and how or in what said surplus, undivided profits or undivided accumulations is invested."

Affidavit.

Further provision as to banks, etc.

SECTION 3. If any such bank, institution or corporation, on the first day of July in any year, has invested in the bonds or funds of the United States, which are by law exempt from taxation, more of its surplus, undivided profits or undivided accumulations than an amount equal to ten per cent of such capital stock, the excess of the amount so invested over the amount equal to ten per cent of such capital stock shall be exempt from taxation for that year and deducted from the amount of surplus, undivided profits,

or undivided accumulations, upon which tax is to be assessed under this article, provided such was made in good faith and not for the purpose of avoiding taxation. The officer who makes the report required by the second section of this article shall attach to the report his affidavit, stating that such investment was made in good faith, and not for the purpose of avoiding taxation.

SECTION 4. That each of said banks, institutions and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of congress or under the charters of the state banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the Governor of the Commonwealth; and upon such agreement and consent being delivered, and in consideration thereof, such bank, and its shares of stock, shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank.

May be exempt from other taxation.

SECTION 5. The said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly: *Provided*, They pay the tax provided in section 1 from the passage of this act.

Banks as to section 4.

SECTION 6. This act shall be subject to the provisions of section eight (8), chapter sixty-eight (68), of the general statutes.

Failure to comply.

SECTION 7. If any bank, state or national, shall refuse or fail to pay the tax imposed by this act, or shall fail or refuse to make the consent and agreement as prescribed in section 4, the shares of the stock of such bank, institution, or corporation and its surplus, undivided accumulations, and undivided profits, shall be assessed as directed by section 2 of this act, and the same taxes, state county and municipal, shall be imposed, levied and collected upon the assessed shares, surplus, undivided profits, undivided accumulations, as is imposed on the assessed taxable property in the hands of individuals: *Provided*, That nothing herein contained shall be construed as exempting from taxation for county or municipal purposes any real estate or building owned and used by said banks or corporations for conducting their business, but the same may be taxed for county and municipal purposes as other real estate is taxed.

Supreme Court of the United States.

No. 255.—October Term, 1901.

The City of Covington, Kentucky, and John N. Middendorf, Assessor of the City of Covington, Appellants, *vs.* The First National Bank of Covington, Kentucky. } Appeal from the Circuit Court of the United States for the District of Kentucky.

[April 28, 1902.]

On July 23, 1900, the appellee herein filed a bill seeking to enjoin the threatened assessment and collection by the defendants below (appellants here) of municipal taxes under the assumed authority of an act of the general assembly of the State of Kentucky approved March 21, 1900, a copy of which is excerpted in the margin.*

In substance, it was averred in the original bill and in an amendment thereto that the complainant was chartered on November 17, 1884, for a term of twenty years; that in 1886, by the acceptance of the provisions of an act of the general assembly of Kentucky, approved May 17, 1886, known as the Hewitt Act, a contract was entered into with the State of Kentucky, irrevocable during the existence of the charter of the bank, whereby the

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* "Whereas the Supreme Court of the United States has lately decided that article three, chapter one hundred and three of the Acts eighteen hundred and ninety-one, eighteen hundred and ninety-two, eighteen hundred and ninety-three is void and of no effect in so far as the same provides for the taxation of the franchise of national banks, in consequence of which decision there is not now and has not been since adoption of said article, in eighteen hundred and ninety-two, any adequate mode of taxing national banks, while State banks are now, and have been ever since eighteen hundred and ninety-two, taxable for all purposes, State and local; therefore

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. That the shares of stock in each national bank of this State shall be subject to taxation for all State purposes, and shall be subject to taxation for the purposes of each county, city, town and taxing district in which the bank is located.

"Sec. 2. For purposes of the taxation provided for by the next preceding section, it shall be the duty of the president and the cashier of the bank to list the said shares of stock with the assessing officers authorized to assess real estate for taxation, and the bank shall be and remain liable to the State, county, city, town and district for the taxes upon said shares of stock.

"Sec. 3. When any of said shares of stock have not been listed for taxation for any of said purposes under levy or levies of any year or years since the adoption of

complainant became obligated to pay to the State taxes upon the shares of its stock, surplus and undivided profits at a designated rate, such taxes to be in full of all other taxes (State, county or municipal,) except those levied upon its real property; that complainant had regularly made the payments stipulated in said contract up to and including the payment due July 1, 1900; that the taxes thus paid much exceeded the regular taxes imposed by the State during said period upon other real and personal property; and that the fact of the existence of an irrevocable contract had been conclusively determined by the judgment and decree of the Court of Appeals of Kentucky in a litigation between the bank and the State and the city of Covington, growing out of an attempt to collect State and city taxes upon the franchise of the bank, under the authority of an act of the general assembly of Kentucky, approved November 11, 1892. It was also averred that notwithstanding the foregoing the general assembly of Kentucky enacted the statute of March 21, 1900, already referred to, and that the defendants were attempting, under the assumed authority of said act, to compel complainant to list for taxation its shares of stock, and that the defendants designed and intended to assess said shares and to collect municipal taxes thereon for the benefit of the city of Covington for the years 1893 to 1900, both inclusive.

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the revenue law of eighteen hundred and ninety-two, it shall be the duty of the president and cashier to list the same for taxation under said levy or levies; provided, that where any national bank has heretofore, for any year or years, paid taxes upon its franchise as provided in article three of the revenue law of eighteen hundred and ninety-two, said bank shall be excepted from the operation of this section as to said year or years; and provided further, that where any national bank has heretofore, for any year or years, paid State taxes under the Hewitt bill in excess of the State taxes required by this act for the same year or years, said bank shall be entitled to credit by said excess upon its State taxes required by this act.

"SEC. 4. All assessments of shares of stock contemplated by this act shall be entered upon the assessor's books, certified and reported by the assessing officers as assessments of real estate are entered, certified and reported, and the same shall be certified to the proper collecting officers for collection as assessments of real estate are certified for collection of taxes thereon.

"SEC. 5. The assessments of said shares of stock and collection of taxes thereon, as contemplated by this act, may be enforced as assessment of real estate and collection of taxes thereon may be enforced.

"SEC. 6. The purpose of this act is to place national banks of this State, with respect to taxation, upon the same footing as State banks as nearly as may be consistently with said article three of the revenue law and said decision of the Supreme Court.

"SEC. 7. Whereas, it is important that State banks and national banks should be taxed equally for all purposes, and emergency exists, and this act shall take effect and be in force from and after its passage."

At much length facts were detailed in the bill and amendment regarding a reduction of the capital stock of the complainant made in July, 1897, as to the regular payments of dividends to stockholders during the years for which the tax was sought to be asssessed and collected and as to changes in the ownership of the stock during said period. The unconstitutionality of the statute and the illegality of the threatened proceedings thereunder were asserted upon various grounds.

The defendants filed a plea to the jurisdiction and also demurred for want of equity. A motion for a temporary injunction was heard and granted, the court embodying its views in an elaborate opinion. (103 Fed. Rep. 523.) The order for the temporary injunction concluded as follows:

"It is ordered, adjudged and decreed by the court that the defendants and each of them, until the further order of the court, is enjoined and restrained from making, either against the complainant or any holder of its shares, any assessment or levy of any taxes upon the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900; and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of its capital stock, any taxes upon said shares upon any assessment or levy to be made therefor for any time subsequent to that date. Defendants are left at liberty to make assessments of said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of the taxes so assessed until the court shall have determined from the evidence whether the taxes so assessed are at a higher rate than is permitted by law and to what extent."

The complainant thereupon moved that the injunction be made permanent, and by stipulation the cause was submitted to the court "upon said motion, and also upon the plea of the defendants to the jurisdiction of the court, and also upon their demurrer to the bill of complaint," it being agreed that "if the said plea and said demurrer are both disallowed and overruled, then the cause is submitted for the judgment of the court as upon a final hearing, the bill then to be taken for confessed, and further delay thereon being waived."

On December 17, 1900, the following decree was entered:

"This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof and of the stipulation filed herein, it is ordered, adjudged and decreed as follows, namely:

"First. That the plea of the defendants to the jurisdiction of the court be, and the same is, disallowed and overruled.

"Second. That the bill of complaint, as amended and and to which the demurrer and plea were considered as applying, is sufficient and contains matters of equity meet to be considered by the court, and the demurrer thereto is also disallowed and overruled.

"Third. Upon the reasons given in the opinion of the court heretofore filed herein, and upon other good and sufficient reasons appearing to the court, it is further ordered, adjudged and decreed by the court that the defendants and each of them are perpetually enjoined and restrained from

making, either against the complainant or any holder of its shares any assessment or levy of any taxes upon any of the shares of complainant's capital stock for any purpose for any time or period previous to March 21, 1900, and the said defendants, until the further order of the court herein, are also restrained from collecting, either from the complainant or from any of the holders of the shares of the capital stock, any taxes upon any of said shares, upon any assessment or levy to be made therefor for any time subsequent to that date. The defendants are left at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendants elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

An application for the allowance of an appeal was filed by the city of Covington and Middendorf; and an assignment of errors was also filed on behalf of said defendants, the grounds, as stated therein, being reproduced in the margin.*

An order allowing the appeal as prayed was made. No appeal was prayed by the complainant.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

It is apparent that the bill as amended sought by injunction to prevent the collection of taxes on the shares of stock of the bank for the years 1893

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*"Come now the defendants and each of them and file the following assignment of errors, upon which they and each of them will rely:

"First. The court erred in overruling the defendants' plea to the jurisdiction of the court.

"Second. The court erred in holding the bill of complaint as amended, to which the plea and demurrer were considered as applying, sufficient, and in overruling the demurrer of the defendants thereto.

"Third. The court erred in enjoining the defendants and each of them from assessing the shares of stock in complainant bank, and from levying taxes thereon for any purpose for any time or period previous to March 21, 1900, and erred in enjoining and restraining the collection of any taxes, either from the complainant bank or from any of the holders of the shares of the capital stock of said bank, for any time subsequent to that date.

"Fourth. The court erred in retaining control of this cause for any purpose.

"Fifth. The court erred in decreeing costs herein against defendant.

"Sixth. The court erred in decreeing any injunction or restraining order herein, and in not dismissing complainant's bill of complaint."

to 1900, both inclusive, and indeed it is obvious from the decree that the court considered the case also involved the question whether any other than the taxes provided by the Hewitt Act could be imposed upon the bank during the remainder of its corporate existence. The relief sought was based upon the following grounds: 1. There was a contract with the bank by which the taxes authorized by the act of 1900 could not be levied without impairing the obligation of such contract. 2. The existence of this contract and its binding efficacy was concluded by the thing adjudged. 3. The tax provided by the act of 1900 was discriminatory and repugnant to section 5219 of the Revised Statutes. Now, although the Circuit Court enjoined the assessment and collection of taxes for the years prior to March 21, 1900, it did so, not upon the consideration and determination of the questions of contract or *res adjudicata*, but solely upon the question of discrimination. So far, however, as respected any taxes subsequent to March 21, 1900, were concerned, they were not disposed of, for the decree expressly provided as follows:

"The defendants are at liberty to make assessments of and upon said shares for taxation for any proper time or period after March 21, 1900, but not to make any collection of taxes so assessed until the court shall have determined, upon further pleadings and evidence herein, should the defendant elect to present the same, whether the taxes so assessed are at a higher rate than is permitted by law, and to what extent.

"Fourth. And the court hereby retains control of this cause for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital stock of the complainant at any time between the entry of this judgment, and the expiration of the present and existing articles of incorporation of the complainant."

Whilst the decree on its face thus unambiguously discloses that the court did not finally dispose of the entire controversy made by the pleadings, an inspection of the opinion of the court makes it perfectly clear that the court did not intend to and did not dispose of the entire controversy which was involved in the cause.

The only opinion pronounced was that rendered on the decision made upon the application for a preliminary injunction. Though in that opinion some reference was made by the court to the contentions of contract and *res adjudicata*, the court expressly declared that it would not make a "final expression on the question," but would leave that subject open for further consideration. And when the court came to render the decree which is appealed from, making the injunction permanent, although it in substance reiterated the provisions of the order allowing the preliminary injunction, it added thereto the fourth paragraph, expressly retaining the cause "for the purpose of adjudicating and settling any question which may arise upon any assessment made upon any of the shares of the capital

stock of the complainant, at any time between the entry of this judgment and the expiration of the present and existing articles of incorporation of the complainant."

The court below, in effect, having reserved for future determination the right of the complainant below to enjoin the collection of a municipal tax for 1900, and subsequent years, this court obviously cannot decide that controversy. Matters within the pleadings having been left undetermined and the cause having been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered was not final. (*McGourkey* v. *Toledo & O. C. R. Co.*, 146 U. S. 536, 545, 546, and cases cited.) As a necessary result this court cannot adjudicate upon the contention respecting that portion of the issue which was actually determined by the Circuit Court, because a decree of a Circuit Court upon the merits can be reviewed here only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause. The case is not to be brought here in fragments by successive appeals. (*Southern Railway Co.* v. *Postal Telegraph Cable Co.*, 179 U. S. 641, 644, and cases cited.)

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.